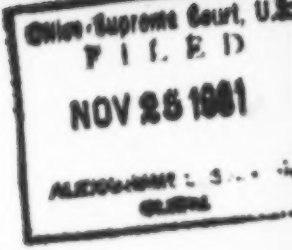
Petition

81-1011



NO. 81____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

KENNETH GRANVIEL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

DOES THE EXCLUSION FOR CAUSE OF A VENIREMAN WHO OTHERWISE UNEQUIVOCALLY AFFIRMS THAT HE COULD NOT VOTE TO IMPOSE THE DEATH PENALTY VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS* BECAUSE HE USES THE WORDS "THINK" AND "FEEL" IN DOING SO?

SHOULD THE FEDERAL COURTS REVIEW A VENIREMAN'S RESPONSES IN THE CONTEXT IN WHICH THEY WERE MADE IN DETERMINING WHETHER HE WAS EXCUSED IN VIOLATION OF *WITHERSPOON V. ILLINOIS*?

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NO. 81___

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to reveiw the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 11, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 655 F.2d 673 (5th Cir. 1981) and appears as Appendix A. The report and recommendation of the United States Magistrate, adopted by the district court, appears as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in *Granviel v. Estelle* was entered on September 11, 1981. A timely filed petition for rehearing was denied on October 13, 1981. This petition for certiorari was filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

United States Constitution, art. XIV, §, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Kenneth Granviel was indicted for the October 7, 1974, capital murder of Natasha McClendon while in the cause of committing rape. On October 6, 1975, jury selection began in this capital trial. Jury selection was concluded on October 17, 1975, and testimony began. On October 24, 1975, Respondent

was convicted of the capital offense. Thereafter, the jury found as true the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and accordingly, punishment was assessed at death.

The Texas Court of Criminal Appeals affirmed the conviction on November 10, 1976, in *Granviel v. State,* 522 S.W.2d 107 (Tex.Crim.App. 1977). Petition for certiorari was denied on May 23, 1977. *Granviel v. Texas,* 431 U.S. 933 (1977).

A state application for habeas corpus relief was denied after a hearing in the district court and consideration by the Texas Court of Criminal Appeals. *Ex parte Granviel,* 561 S.W.2d 503 (Tex.Crim.App. 1978).

Thereafter, Respondent filed his petition for federal habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Texas. On March 27, 1978, after a hearing, the case was transferred to the Northern District, Fort Worth Division. The recommendation of the United States Magistrate was filed on November 27, 1978. The findings of the Magistrate were adopted and judgment denying habeas corpus relief was entered on January 26, 1978. On January 31, 1978, Respondent's notice of appeal was filed, and certificate of probable cause was granted on February 1, 1978.

On September 11, 1981, a panel of the Fifth Circuit rendered an opinion affirming the judgment in part and reversing and remanding in part. A timely filed petition for rehearing was denied. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The decision of the Court of Appeals, which applies a hypertechnical standard of review to a claimed violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), may affect most, if not all, death penalty cases within the jurisdiction of that Court, and may affect many other death penalty cases in other circuits if adopted by those Courts of Appeals. The import of the holding by the Fifth Circuit is to establish a rigid and unwieldy test for review, so that certain words or the lack thereof have acquired a talismanic quality, to the exclusion of a fair consideration of the words in the context in which they were made. Since this decision may affect so many other cases of importance to the States, this Court should grant the writ to review the lower court's decision.

II.

THE EXCLUSION FOR CAUSE OF A VENIREMEN WHO OTHERWISE UNEQUIVOCALLY AFFIRMS THAT HE COULD NOT VOTE TO IMPOSE THE DEATH PENALTY DOES NOT VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS* BECAUSE HE USES THE WORDS "THINK" AND "FEEL" IN DOING SO.

Venireman Donald L. Harrison was excluded for cause from Respondent's capital trial after he three times affirmed that he could not vote to impose the death penalty (S.F. 708-711). The prosecutor asked

> Let me ask *if you, personally sitting as a juror, could ever vote so as to inflict the death penalty?* (S.F. 711).

When Harrison replied that he could not, the prosecutor further inquired,

> That is a definite prejudice or feeling that you could not change? You just don't feel like you would be entitled to take another person's life in that fashion? (S.F.711).

Again, Harrison affirmed that he could not so vote, and would not change his position. The prosecutor inquired a third time, "Okay. *You could not?*" (S.F.711). Harrison, for the third and final time, stated "*No, I could not*" (S.F. 711). (Emphasis added).

The court below found that Harrison was excluded in violation of *Witherspoon,* because his responses were equivocal, due to the use of the words "think" and "feel." The court, in so holding, has applied a hypertechnical construction to the voir dire examination, and in doing so, has established a new standard of review by federal courts.

The record reflects that, once the import of the questions was conveyed to the venireman, he never equivocated in his position that he could never vote to impose the penalty of death. That Harrision stated "no" and then added that he did not "think" that he could ever vote for the death penalty was no more than a manner of speech. His added words, especially in light of his two subsequent positive affirmations that he could not consider or vote for the death penalty, did not render ambiguous his clear and unequivocal position. The questioning of Harrison focused solely upon whether he could ever *vote* to impose the death penalty, not what he "thought" or "felt" about the imposition of

capital punishment. Harrison made unmistakably clear that he would be unable to vote to impose the death penalty. As stated in the dissenting opinion below,

> *Witherspoon* mandates no precise questions and answers. The test is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.'

655 F.2d at 690.

To require the State or trial court in a death penalty case to continue to press a veniremen, where he has affirmed three times that he could not vote for the death penalty or follow the law, is to require the repetition of a matter on which the juror has been clear and which is wholly clear to the parties and the court. Further, to require that a venireman affirm his position with some specific words, but not others, is to establish a rigid and unwieldy test so that certain words or the lack thereof acquire a talismanic quality, to the exclusion of a fair consideration of the import of the words in the context in which they were made. Such a rigid application of the principles of *Witherspoon* simply is unwarranted and places a new and quite substantial burden upon the States seeking to enforce their constitutional death penalty statutes. Because the holding of the court below establishes a new and unwarranted standard of federal review, this Court should grant certiorari to consider this issue.

III.

THE FEDERAL COURTS SHOULD REVIEW A VENIREMAN'S RESPONSES IN THE CONTEXT IN WHICH THEY WERE MADE IN DETERMINING WHETHER HE WAS EXCUSED IN VIOLATION OF *WITHERSPOON V. ILLINOIS.*

In reviewing a claim that a venireman was excluded in violation of *Witherspoon*, the federal courts should consider the context in which the responses were made. To ignore the fact that the trial court previously instructed the veniremen on the applicable law in this regard, and that the *Witherspoon* standard was applied consistently and correctly throughout the entire voir dire, and that neither the trial court, the prosecutor or defense counsel found the venireman's answers equivocal, is to set up a rigid and totally unrealistic method of review.

The record reflects that the trial court had just previously instructed Harrison that this was a capital case wherein there was a possibility that the death penalty could be imposed; that the law required that each possible penalty be considered; that each venireman must follow the law to consider each punishment whether he or she agreed or disagreed with the law; and that during individual voir dire examination each venireman would be asked whether he or she could follow the law (S.F. 161-162, 166-167). The subsequent examination of Harrison should have been considered in light of the trial's court's instructions.

Further, that Harrison, the trial court, and the attorneys saw no equivocation in the questions propounded or answers given is reflected by this record. Where the venireman gives a clear answer to a question, and then adds supporting words, whether the words render equivocal the prior affirmation must be considered in the appropriate context. The trial court had just instructed Harrison that the law specified that the death penalty was one possible punishment to be considered, and that he must be willing to follow the law whether he agreed or disagreed with it, and that he would be asked whether he could follow the law in this regard. After Harrison three times affirmed that he could never vote to impose the death penalty, defense counsel specifically stated that he had no questions for the venireman, and

specifically relinquished the opportunity to pursue the matter with this venireman.[1] Further, that the venireman's responses were unequivocal is supported by the prosecutor's making a challenge and the trial court's sustaining the challenge on this particular record. The entire record of the voir dire examination in this case reveals that the prosecutor, the defense counsel and the trial court fully understood and consistently correctly applied the doctrine of *Witherspoon*. There is no question that the trial court and the prosecutor went to great lengths to ensure compliance with *Witherspoon*. This fact is extremely relevant to show that the court and the parties heard no equivocation in the words of the venireman and supports a finding that the venireman's responses were anything but equivocal in the context in which they were given. Harrison's subsequent assertions, in the face of his knowledge of what was required of him, were tantamount to assertions that he simply could not follow the law in the instant case. As such, his exclusion did not violate *Witherspoon*. *See, Lockett v. Ohio*, 438 U.S. at 596, 597.

The dissenting opinion below correctly stated that the context in which a venireman's responses are made is extremely relevant to a review of the voir dire.

> While the mere demeanor of a venireman cannot contradict his express words so as to give them a meaning in opposition to that which they state, nevertheless, in those instances where the meaning is apparent, elements such as attitude and tone of voice each are relevant factors in conveying the precise message in-

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1. Although the majority opinion found that one reason defense counsel failed to object to the exclusion of Harrison was because he did not believe an objection was necessary under state law, this failure to object and the explicit waiver of further examination should be considered as further support that no one perceived Harrison's responses as equivocal.

> tended. The trial judge and counsel were present, with the opportunity to observe and question Harrison. Here, we think the express words brought forth this message loud and clear: Harrison's attitude toward capital punishment would have prevented him from making an impartial decision on both the guilt and penalty facets of the trial. Moreover, the action of the trial judge (who had seen and heard) in excusing the juror, and appellant's counsel's failure to object, emphasize the appreciation of those who were present that Harrison's views concerning capital punishment would substantially impair the performance of his duties as a juror. (footnotes omitted)

655 F.2d at 690.

For the federal courts to review a claimed *Witherspoon* violation without any consideration of the context in which the questions and answers were given is to blink reality and establish an unrealistic standard of review. This Court should grant certiorari to consider whether the holding in *Witherspoon* and its progeny require such a rigid and unwieldy standard of review.

CONCLUSION

For these reasons, Petitioner prays that the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

NO. 79-1332

* * *

IN THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

* * *

KENNETH GRANVIEL,

Petitioner-Appellant,

V.

W. J. ESTELLE, JR., Director,
Texas Department of Corrections, ET AL,

Respondents-Appellees

* * *

Appeal from the United States District Court for the
Northern District of Texas

* * *

ON PETITION FOR REHEARING
(October 13, 1981)
Before AINSWORTH and HENDERSON,
Circuit Judges,
and HUNTER*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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* District Judge of the Western District of Louisiana, sitting by designation.

ENTERED FOR THE COURT:

Albert J. Henderson
United States Circuit Judge

District Judge Hunter Dissents.

Kenneth GRANVIEL,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director,
Texas Department of Corrections, et al.,
Respondents-Appellees.

No. 79-1332.

United States Court of Appeals,
Fifth Circuit.

Sept. 11, 1981.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER*, District Judge.

HENDERSON, Circuit Judge:

The appellant, Kenneth Granviel, was convicted in the 213th Judicial District Court of Tarrant County, Texas, of capital murder of two-year old Natasha McClendon and received the death sentence. The Texas Court of Criminal Appeals affirmed the conviction,

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* District Judge of the Western District of Louisiana, sitting by designation.

Granviel v. State, 552 S.W.2d 107 (Tex.Civ.App. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977), as well as the subsequent denial of state habeas corpus relief, *Ex Parte Granviel*, 561 S.W.2d 503 (Tex.Cr.App. 1978). Granviel then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas. The case was transferred to the Northern District of Texas, Fort Worth Division, where the petition was denied. This appeal followed.

The gruesome details of the multiple rapes and murders which resulted in Granviel's conviction are fully explicated in the first opinion of the Texas Court of Criminal Appeals, 552 S.W.2d at 110-12. Hence, we gladly refrain from repeating them here. Suffice it to say that altogether, and in the course of two separate killing sprees, Granviel raped four women and stabbed to death five women and two children. He fully confessed to these crimes and relied solely on the defense of insanity at trial.

On this appeal, Granviel seeks habeas relief on four distinct grounds. We consider the problems he raises seriatim.

Granviel first maintains that the Texas capital sentencing statute, as applied in this case, violated his rights under the Eighth and Fourteenth Amendments. The bifurcated procedure employed by Texas courts in the trial of capital offenses is set out in Tex.Code Crim. Pro.Ann. art. 37.071.Under this system, the jury first decides the question of guilt or innocence. In the event of a guilty verdict, a separate sentencing proceeding is held in which additional aggravating and mitigating evidence may be introduced. The jury then answers the following questions on the basis of the evidence adduced at both phases of the trial:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. (Not applicable in this case.)

Art. 37.07.(b). The state must prove each issue submitted beyond a reasonable doubt: Art. 37.071(c). If the jury answers each of these questions affirmatively, the death penalty is mandatory under the terms of the statute. A life sentence is required if the jury responds "no" to any one question. Art. 37.07(e).[1] In Granviel's case, the jury answered "yes" to the first and second questions and, accordingly, the trial court imposed the death sentence.

Granviel specifically contends that this sentencing procedure, as applied in his particular case, did not allow the jury to consider *as a mitigating factor* the evidence of his mental instability. Rather, his mental abnormality renders him a dangerous person who would admittedly "constitute a continuing threat to society" for purposes of answering the question contained in art. 37.071(b)(2). Therefore, according to Granviel, having failed to persuade the jury on the insanity defense, the evidence of his mental condition

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1. An affirmative answer requires unanimity, whereas ten of the twelve jurors may return a negative answer. Art. 37.071(d).

could only possibly have served as an aggravating factor at the penalty phase of the trial.[2]

The Supreme Court has made quite clear that the sentencing authority in a capital case may "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973, 990 (1978) (emphasis in the original); *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). With this standard in mind, the Court held, in response to a similar challenge to art. 37.071(b), that the second statutory question, as construed by the Texas Court of Criminal Appeals, "allow[ed] the defendant to bring to

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2. Neither the prosecution nor the defense presented additional evidence at the sentencing stage. Instead, both sides chose to rely on the record made during the trial on guilt or innocence.

The evidence of Granviel's mental disturbance was by no means insubstantial. As a child, he attempted several times to burn down his mother's house. His younger brother often observed him tying pillows with strips of rags to simulate the body of a woman and then "having sex with them." At times, he tried to force his brother into performing homosexual acts with him. When he was sixteen, Granviel beat and attempted to rape his mother, threatening to kill her, his younger brother and himself. Thereafter, he was sent to Gatesville State School for Boys, where he described to a psychiatrist his pleasure at sticking knives into meat and "watching the blood squirt" while working in the school kitchen. A few years after his release from Gatesville, Granviel jumped out of a tree onto his girlfriend and later hung her by her heels over a banister while threatening to drop her. Approximately two weeks before the first set of murders, he stood on the same girl's stomach, beat and raped her at gunpoint. One psychologist who testified for the defense diagnosed Granviel as a paranoid schizophrenic.

the jury's attention whatever mitigating circumstances he may be able to show." *Jurek v. Texas*, 428 U.S. 262, 272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929, 939 (1976). One such mitigating factor enumerated by the Texas court in its opinion in the *Jurek* case was "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." *Jurek v. State*, 522 S.W.2d 934, 939–40 (Tex.Cr.App. 1975).

In the instant case, the Texas Court of Criminal Appeals met squarely Granviel's particular challenge to the statute, concluding:

> Moreover, the jury in answering the special issues may properly consider all the evidence adduced during both the guilt and punishment phases of the trial. This could include evidence of a defendant's mental condition—whether such evidence be characterized as an 'aggravating' or 'mitigating' factor. Thus, Article 37.071(b), supra, does not prevent the jury from considering a defendant's mental condition as a mitigating factor.

561 S.W.2d at 516.

While we agree that the evidence of Granviel's mental condition, when channeled through the second statutory inquiry, most likely had an aggravating *result* in his individual case, we do not believe that the jury was absolutely precluded from *considering* this evidence in mitigation. Indeed, taking a quite different tack from that used here, defense counsel stressed the following point during closing argument at the penalty phase of the trial:

> Mr. Strickland has told you the Defendant's sanity is no longer an issue and I agree. You have made up your mind on that point, but it is not true that

> the state of his mind, his mental condition is still an issue, not so far as a defense of insanity, but there is not any witness who testified in this case who led you to believe that there was nothing wrong with this man. If he is a sociopath, you heard Dr. Methner—they burn out. Sociopaths burn out. It's a deep disease of youth. It is a personality disorder of youth.
>
> Dr. Methner also said this man could benefit from psychiatric help.

R. 3275-76. Moreover, Granviel proffered a similar argument on his direct appeal to the Texas Court of Criminal Appeals. There, he maintained that because of his "antisocial personality disorder," the evidence should be considered *insufficient* to support the jury's affirmative answer to the second statutory question.

We also disagree with Granviel's suggestion that art. 37.071(b)(2) is the only statutory question relevant to our investigation.[3] Art. 37.071(b)(2) requires the jury

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3. The Supreme Court based its decision in *Jurek v. Texas* on art. 37.071(b)(2), but stated with respect to the other statutory provisions:

> The Texas Court of Criminal Appeals has not yet construed the first and third questions . . .; thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry. For example, the third question asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased. This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her. We cannot, however, construe the statute; that power is reserved to the Texas courts.

428 U.S. at 272 n. 7, 96 S.Ct. at 2956 n. 7, 49 L.Ed.2d at 938 n. 7.

to decide whether the defendant acted *deliberately* and with the reasonable expectation that death would result. This inquiry seems to be the better vehicle for the concept of mitigation which is of primary importance to Granviel, i.e., that mental disorder lessens moral culpability.

It is true, as the NAACP maintains in its *amicus curiae* brief, that a "yes" answer to the first statutory question logically follows from a conviction of capital murder. *See* Tex.Penal Code Ann. § 19.03. However, such is not necessarily the case. The Texas Court of Criminal Appeals explains the inconsistency as follows:

> [A] jury having found that a defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done. However, the inconsistent answer to the question Art. 37.071(b)(1) reflects only that the jury did not want the death penalty assessed.

Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex.Civ. App. 1977). Similarly, in *Brown v. State*, 554 S.W.2d 677 (Tex.Cr.App. 1977), the Texas court rejected the contention that art. 37.071(b)(1) requires the same finding as a determination of guilt under § 19.03.

It is not inconceivable that a jury, having found the requisite intent for a conviction of capital murder and having rejected the insanity defense, may yet conclude that, because of evidence of mental disturbance, a defendant's acts should not be deemed sufficiently deliberate to warrant the death penalty. Here again, we note than Granviel propounded a similar argument on his first appeal, where he maintained that the murder of Natasha McClendon "occurred in a frenzy" and that there was insufficient evidence that it was done deliberately. 522 S.W.2d at 123. True, the Texas Court of

Criminal Appeals did not agree with Granviel's reasoning. But the jury's affirmative answer to the question, and the appellate court's determination that the evidence was sufficient to support that response, do not persuade us that the jury was precluded from *considering* the evidence of Granviel's mental instability as a mitigating factor. He is entitled only to this consideration. Given the Supreme Court's holding in *Jurek v. Texas* with respect to art. 37.071(b)(2), and our own understanding of the Texas court's construction of art. 37.071(b) as a whole, we conclude that the capital-sentencing statute is not unconstitutional as applied to Granviel.

As a second attack on the validity of his death sentence, Granviel asserts that five veniremen were improperly excluded for cause in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968).[4] The *Witherspoon* rule has been the subject of much discussion since its pronouncement, *see, e.g., Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *Marion v. Beto*, 434 F.2d 29 (5th Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S.Ct. 1372, 28 L.Ed.2d 646 (1971); *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc), and we do not delve into its intricacies here. Briefly stated, *Witherspoon* provides that a venireman may be excused for cause only if he is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circum-

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4. The Supreme Court recently upheld the applicability of *Witherspoon* to Texas' bifurcated procedure. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). We note that Tex.Penal Code Ann. § 12.31(b), the statute which was held in *Adams* to have been improperly used as an independent basis for the exclusion of prospective jurors, is not in issue here.

stances that might emerge in the course of the proceedings." 391 U.S. at 522 n.21, 88 S.Ct. at 1777 n.21, 20 L.Ed.2d at 785 n.21. The state retains the right to exclude only those veniremen who

> ma[k]e unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. (emphasis in original.)

Of the five veniremen whose exclusion Granviel challenges,[5] the district court held, in accordance with the magistrate's recommendation, that one venireman, Donald L. Harrison, was improperly excused for cause for merely voicing conscientious scruples against the death penalty. We, too, believe that Harrison's exclusion for cause constituted a *Witherspoon* violation.[6] He was first asked whether he had conscientious scruples against the infliction of the death penalty, whereupon he stated, "I don't know what that means." When asked if he could ever vote to inflict the death penalty, he replied, "No, I don't *think* I could." Then, in response to the question, "You just don't *feel* like you would be entitled to take another person's life in that fashion?" he nodded and then said, "No, I could not." These questions and answers fall far short of an affirmation by Harrison that he would automatically vote

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5. The relevant voir dire examination of each of these veniremen—Donald L. Harrison, Homer N. Lipscomb, Inez Wallace, Mrs. Roy I. Cox and Mattie D. Vernon—is reproduced in the Appendix.

6. We express no opinion as to the propriety of striking prospective jurors Lipscomb, Wallace, Cox, and Vernon.

against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt.

This court recently reaffirmed its commitment to ensuring strict adherence to the mandates of *Witherspoon* in *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc). There, we explained the improper exclusion of a prospective juror as follows:

> [T]hree times in succession Mrs. Doss stated that she did not believe in the death penalty, following with an affirmation that it would affect her deliberations on any issue of fact in the case. These are strong expressions indeed, but they fall short of unequivocal avowals disqualifying her under either aspect of *Witherspoon*'s two-pronged test. . . .

626 F.2d at 397–98. Mr. Harrison's equivocation differs slightly in kind from that of Mrs. Doss, but is certainly of no lesser degree. While Mrs. Doss stated that the possibility of the death penalty would "affect" her deliberations on any issue of fact, Mr. Harrison made no such representations and, indeed, was never questioned as to whether his attitude toward the death penalty would prevent him from making an impartial determination as to guilt. Further, Mrs. Doss's repeated disclosures that she did not believe in the death penalty were no less indicative of an automatic vote against the imposition of capital punishment than was Mr. Harrison's statement that he did not feel that he would be entitled to take another person's life.

[3] Normally, our determination that veniremen Harrison was improperly excused would conclude our inquiry; for if just one prospective juror is struck for reasons insufficient under *Witherspoon*, the death penalty must be set aside. *Davis v. Georgia*, *supra*; *Ma-*

rion v. Beto, supra. However, in the instant case, the district court, again following the magistrate's recommendation, held that defense counsel's failure to contemporaneously object to the improper exclusion amounted to a waiver of the *Witherspoon* error.

The Supreme Court established in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that a state procedural waiver of a constitutional claim bars federal habeas corpus review absent a showing of "cause" and "prejudice." The prejudice resulting from the exclusion of a juror in violation of *Witherspoon* can hardly be questioned in light of decisions such as *Davis v. Georgia* and *Marion v. Beto*. Granviel maintains that the cause for the failure to object was the reliance by defense counsel on Texas case law which, at the time of his trial, indicated that a contemporaneous objection was not a prerequisite to the subsequent assertion of a *Witherspoon* error. It would seem, however, that the absence of a state contemporaneous objection rule would render the *Sykes* issues irrelevant. Thus, we turn to Granviel's contention that there was no such rule in Texas in October of 1975.

In *Tezeno v. State*, 484 S.W.2d 374 (Tex.Cr.App. 1972), the Texas Court of Criminal Appeals entertained *Witherspoon* challenges to the exclusion of several jurors, including one whose voir dire examination was much the same as that of venireman Harrison.[7]

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7. Do you have any conscientious scruples against the assessment of death as a punishment for the crime of murder, in a proper case, sir?

A Yes, sir, I do.

Q I take it, by your answer, then, that there are no facts or circumstances whatever, that would justify you, personally, in rendering a death verdict in a murder case?

(footnote continued on following page)

The court concluded (incorrectly, we believe) that no violation occurred, but nevertheless reached the merits of the *Witherspoon* claim even though defense counsel had expressly stated that he had no objection to the challenge for cause. The court reasoned as follows:

> Waiver of objection apparently will not, in itself, vitiate an improper challenge. It is, however, a factor to be considered in cases such as the one at bar, where the exact meaning of a venireman's answer cannot be ascertained with total accuracy from the words of his answer alone.

484 S.W.2d at 383 n.2.

On April 30, 1975, the Texas Court of Criminal Appeals decided *Hovila v. State*, 532 S.W.2d 293 (Tex.Cr. App. 1975), holding that several jurors were struck for reasons insufficient under *Witherspoon*. Defense counsel had voiced no contemporaneous objections to the improper exclusions, and yet the court did not even mention the possibility of waiver.

It was not until its decision in *Boulware v. State*, 542 S.W.2d 677 (Tex.Cr.App. 1976), where it expressly overruled *Hovila* and *Tezeno*, that the Texas court held that the failure to object constituted a waiver of a

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> A I don't believe I could.
> Q All right. You're just absolutely opposed to that penalty, on conscientious grounds?
> A Yes, sir.
> Q Thank you, sir.
> MR. BENNETT: We'll challenge for cause.
> MR. CALDWELL: No objections, Your Honor.
> THE COURT: All right. You're excused, Mr. Juror.

484 S.W.2d at 382–83.

Witherspoon claim. We cannot enforce against Granviel a contemporaneous objection rule that apparently did not even exist at the time of his trial.[8]

We must admit that we reach this result reluctantly and without great satisfaction. We obviously do not have here the situation perceived by Judge Goldberg in his opinion in *Jurek v. Estelle*, 593 F.2d 672 (5th Cir. 1979), now vacated by the decision of the court en banc, 623 F.2d 929 (1980) (*see* 5th Cir. Rule 17). He concluded that Jurek's trial counsel was either ignorant of the *Witherspoon* holding or that he misunderstood it, thus explaining his failure to object to improper exclusions. Granviel's counsel was well-aware of the *Witherspoon* rule, as his objections to certain lines of questioning demonstrate.[9] He did, in fact, object to the exclusion of Mattie D. Vernon on *Wither-*

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8. The treatment given Granviel's *Witherspoon* claims on his direct appeal is somewhat confusing. The Texas court discussed the responses of each of the five veniremen, implying that exclusion was proper. Then, as to each one (except Mattie D. Vernon, whose exclusion did elicit an objection), it cited *Boulware* in concluding no error was shown. 552 S.W.2d 112–14.

9. I'm going to object. That is an improper question, whether it would be in conflict with religious feelings.
R.1058.

. . . .

I object. The most the State can demand is a person be willing to consider all the penalties.
R.1059–60.

. . . .

I will object to that as being an improper question. The question is whether or not she would unequivocally and automatically vote against it in every case.
R.1725.

By the same token, the prosecutor and the trial judge were also cognizant of the need to comply with *Witherspoon*. Indeed, the observation made by Judge Gee in *Burns v. Estelle*, 592 F.2d

(footnote continued on following page)

spoon grounds.[10] As to the other challenged exclusions, defense counsel testified at the state habeas hearing that he deliberately chose not to object because he felt he was not required to do so under Texas law. We cannot condone such tactics. Indeed, we agree with the state's assessment that "[t]o fail to object when counsel perceives error is to undermine the integrity of the judicial process." However, faced with the apparent absence of a Texas contemporaneous objection rule at the time of Granviel's trial, and ever-mindful of the gravity of a *Witherspoon* transgression and the consequences of precluding its assertion, we decide that the error in excluding venireman Harrison was not waived. Accordingly, Granviel's death sentence cannot stand.

As his third ground of error, Granviel asserts that the allowance of certain psychiatric testimony at the guilt phase of the trial violated the attorney-client privilege and resulted in the deprivation of his Sixth

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1297, 1302 (5th Cir. 1979), *reheard en banc*, 626 F.2d 396 (1980), is equally applicable here: "[M]uch of the voir dire concerned the *Witherspoon* problem; the trial judge's comments and questions . . . clearly indicate that his attention was focused upon it during the entire process of cutting the panel." In *Burns*, these factors militated against the finding of a waiver. The en banc opinion reaffirmed the panel's holding on the merits, thus implicitly approving the discussion of the waiver issue.

10. For the purpose of the record, I am going to object to the exclusion of Mrs. Mattie D. Vernon on the grounds her questions (sic) were less than unequivocal and never did she say she would automatically vote against the death penalty in every case. . . .
R.1728.

Amendment right to effective assistance of counsel.[11] Since our resolution of this issue is largely dependent on certain aspects of Texas law, we find the Texas Court of Criminal Appeals' analysis of the problem on Granviel's direct appeal most helpful, both as to the facts and the relevant state law:

> Appellant contends that the attorney-client privilege was violated by the State's subpoenaing and calling to the witness stand psychiatrist John T. Holbrook, who was appointed to examine appellant at the request of appellant's court appointed counsel. Appellant contends that Dr. Holbrook was an agent of appellant's trial counsel because he was employed to assist them in the preparation of the defense in the trial. The appellant's only defense is that he was insane at the time of the commission of the offense.
>
> On the written request of appellant the court appointed Charles Dickens and Frank Sullivan, Esquires, practicing attorneys to defend him on Feb-

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11. We assume that Granviel employs this argument as an attack upon the conviction itself, and that it is not another challenge aimed solely at the validity of his death sentence. We note, however, that he does not specifically complain that the psychiatrist's testimony weakened his insanity defense, but rather that it damaged him in relation to the jury's determination under Art. 37.071(b)(2). And yet, our examination of the record reveals no testimony by Dr. Holbrook which touched directly on the issue of Granviel's future dangerousness. Rather, the import of his testimony was that Granviel suffered from no psychosis and that he was sane, within the legal definition, at the time of the commission of the offenses. As we mentioned previously, neither the prosecution nor the defense offered additional testimony at the separate sentencing phase of the trial. Also, the prosecutor's only reference to Dr. Holbrook's testimony during arguments at the penalty phase was that "Dr. Holbrook said he [Granviel] should be held accountable for what he did." R.3291.

ruary 13, 1975. Appellant's counsel then contacted Dr. Holbrook, a psychiatrist, some time before April 26, 1975, and requested him to examine appellant in the Tarrant County Jail. These examinations were made on April 26 and May 16, 1975. Present at both examinations were the psychiatrist, appellant and counsel. Dr. Holbrook stated that appellant satisfactorily communicated with him and responded to his questions during the examination.

On May 22, 1975, upon counsel's written motion, the trial court appointed Dr. John T. Holbrook 'to examine the defendant in the Tarrant County Jail at any and all times that are convenient both to Dr. John Holbrook and the Sheriff.' On the same date the court upon appellant's counsel's written notice appointed Dr. M. Jerold May to administer psychological tests to appellant at his office in Fort Worth, which tests were made at a later date. On August 9, 1975, upon the State's request the court appointed Dr. Hugh Brown, a psychiatrist, to examine appellant at the Tarrant County Jail. Dr. Brown wrote the court of his inability to examine appellant because appellant refused to talk to him without his counsel being present. Dr. John Methner, a court appointed psychiatrist requested by the State, testified that on April 13, 1975, when he tried to examine the appellant in the presence of his counsel, he was unable to do so because appellant refused to talk to him or cooperate for the examination. Counsel stated that he advised the appellant that he did not have to talk to the psychiatrist (Dr. Methner); however, the psychiatrist did get to observe appellant for a while.

Art. 46.02, Sec. 2(f), V.A.C.C.P., as amended August 30, 1971, and effective at the date of the appointment of Dr. Holbrook on May 22, 1975, provides;

'(1) The court may, at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and as to his sanity, and to testify thereto at any trial or hearing in connection to the accusation against the accused . . .

* * * * * *

(4) No statement made by the defendant during examination into his competency shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding no matter under what circumstances such examination takes place.

(5) Any party may introduce other competent testimony regarding the defendant's competency.'

Under this statute, the trial court's allowing Dr. Holbrook to testify was proper. '[A]ppoint disinterested qualified experts to examine the defendant . . .' clearly means that such expert is not appointed by the court as the expert of the State or the defense, but is the court's disinterested expert. He may appoint such expert at his discretion and without a motion therefore (sic), and either party may subpoena such witness. Therefore, no attorney-client privilege exists as to Dr. Holbrook.

In *Stultz v. State*, [Tex.Cr.App.], 500 S.W.2d 853, this Court said:

'A psychiatric examination *is not an adversary proceeding*. Its purpose is not to aid in establishment of facts showing that an accused committed certain acts constituting a crime; rather, its sole purpose is to enable an expert to form an

opinion as to an accused's mental capacity to form a criminal intent.

Because of the intimate, personal and highly subjective nature of a psychiatric examination, *the presence of a third party in a legal and non-medical capacity would severely limit the efficacy of the examination . . .*' (Emphasis added.)

Compare *Walker v. State*, Tex.Cr.R. 176 (1885). See also *Gholson v. State*, Tex.Cr.App., 542 S.W.2d 395 (1976).

Art. 46.03, Sec. 3, V.A.C.C.P. effective June 19, 1975, provides as follows:

'(a) If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to the insanity defenses and to testify thereto at any trial or hearing on this issue, but the court may not order the defendant to a state mental hospital for examination without the consent of the head of the state mental hospital.

* * * * * *

(d) A written report of the examination shall be submitted to the court within 21 days of the order of examination and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney. The report shall include a description of the procedures used in the examination and the examiner's observations and findings pertaining to the insanity defense.

* * * * * *

(g) The experts appointed under this section to examine the defendant with regard to the insanity defense also may be appointed by the court to examine the defendant with regard to his competency to stand trial pursuant to Section 3 of Article 46.02 of this code, provided that separate written reports concerning the defendant's competency to stand trial and the insanity defense shall be filed with the court.'

Cf. Article 46.02, Sec. 3, V.A.C.C.P. (Incompetency to stand trial).

A procedural statute controls litigation from its effective date. *Wilson v. State*, Tex.Cr.App., 473 S.W.2d 532. The trial of the instant case was in October 1975, and Article 46.03, Sec. 3, supra, was then effective and controlling. *Wilson*, supra. Cf. *McCarter v. State*, [Tex.Cr.App.], 527 S.W.2d 296.

Articles 46.03 and 46.02, supra, negate the contention of appellant that the attorney-client privilege was violated. Both the State and appellant had the right to subpoena the psychiatrist and adduce his testimony at the trial. There is no difference in the result when the examinations were completed before the appointment was made, as in the instant case, and when a psychiatrist is appointed by the court and then makes his examination.

Communications between a physician and his patient are not privileged under Texas Law. Texas has no statute establishing the privilege and the courts invariably deny its recognition. See *Bonewald v. State*, 157 Tex.Cr.R. 521, 251 S.W.2d 255.

* * * * * *

> There is no affirmative evidence in the instant case showing that Dr. Holbrook revealed any fact or communication between him and appellant showing that appellant committed a *crime of any nature*. The testimony shows to the contrary that Dr. Holbrook never communicated to anyone in the district attorney's office any such statements or facts, if any, resulting from the examinations he made of appellant as to his sanity or his competency. Therefore, Article 46.02, Sec. 2(f)(4), supra, and Article 46.03, Sec. 3, supra, have not been violated.
>
> Appellant claims that Dr. Holbrook's examination was necessary to his defense of insanity and failure to request the examination would have been ineffective assistance of counsel. Appellant contends that by employing Dr. Holbrook he created an involuntary State's witness who gave testimony adverse to appellant relating to Special Issue No. 2 under Article 36.071(b)(2), V.A.C.C.P. In view of our previous discussion of the status of Dr. Holbrook as a disinterested expert witness under Articles 46.02, Sec. 2(f) and 46.03, Sec. 3, this contention is without merit.

552 S.W.2d at 114–17. (Emphasis in original.)

Granviel admits that, in order to prevail on this issue, he must establish that his conversations with Dr. Holbrook were protected within the attorney-client privilege as it exists in Texas. However, it is clear that under Texas law, as interpreted by the Texas Court of Criminal Appeals, the attorney-client privilege does not attach in this situation. Rather, psychiatrists or psychologists who examine a defendant with respect to competency or insanity are designated as "disinterested qualified experts." As such, they may be subpoenaed by either party and they are not, as Granviel suggests, agents of either defense counsel or the prosecutor.

We realize that several state courts have, indeed, adopted the rule advocated by Granviel. *See, e.g., Lindsay v. Lipson*, 367 Mich. 1, 116 N.W.2d 60 (1962); *San Francisco v. Superior Court*, 37 Cal.2d 227, 231 P.2d 26 (1951); *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957). Also, the Third Circuit, faced with a remarkably similar set of facts, concluded that the attorney-client privilege should be recognized when a psychiatrist is secured by defense counsel for assistance in trial preparation. *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975).[12] However, it did so in the context of a direct appeal from a federal conviction. We are not here deciding the scope and appropriate application of the attorney-client privilege for federal criminal proceedings; hence, we are not at liberty to flatly agree or disagree with the Third Circuit rule. Rather, we must determine whether such a rule of privilege, though perhaps preferred, is constitutionally required.

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12. The court analogized the case to *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), where the Second Circuit held the privilege applicable to communications made to an accountant for the purposes of aiding counsel in preparing a defense. From there, it reasoned that the appellant had been denied effective assistance of counsel, as follows:

> The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.

519 F.2d at 1046–47.

[5] In concluding that there is no such constitutional mandate, we substantially agree with the rationale of Judge Weinstein in his excellent and thorough opinion in *Edney v. Smith*, 425 F.Supp. 1038 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir. 1977), a habeas corpus case which, for our present purposes, involved essentially the same facts.[13] Recognizing that the defendant might suffer prejudice as a result of the New York rule allowing the psychiatrist to testify, Judge Weinstein inquired as to whether "the balance drawn by New York is so detrimental to the attorney's effective representation of his client as to be prohibited by the Sixth Amendment." 425 F.Supp. at 1053.[14] He then answered this question negatively:

> We can only speculate that the New York rule results in substantial prejudice to criminal defendants.
>
> The statements by the defendant to his psychiatrist were not admitted to establish the fact of his having committed the murder, but only to establish a basis for the psychiatrist's evaluation of petitioner's sanity at the time of the offense.[15] Given this limited use, any possible prejudice may be balanced, within

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13. In *Edney*, the New York state court had not held, as the Texas court did here, that the attorney-client privilege was inapplicable, but rather that it had been waived by the mere assertion of the insanity defense. *People v. Edney*, 39 N.Y.2d 620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976). As a practical matter, there would seem to be little difference in the effects of these two approaches.

14. Judge Weinstein noted that the *Alvarez* court, although using language "constitutional in tone," did not have a constitutional question before it.

15. In the instant case, Dr. Holbrook did not relate to anyone the statements made to him by Granviel, but only his expert opinion derived from the psychiatric examination.

> limits not exceeded in this case, by the strong counter-balancing interest of the State in accurate fact-finding by its courts.
>
> In sum, it seems undesirable at this time to canonize the majority rule on the attorney-psychiatrist-client privilege and freeze it into a constitutional form not amenable to change by rule, statute, or further case-law development.

425 F.Supp. at 1054.

We are especially driven to this outcome in this case where Granviel, at his counsel's urging, refused to cooperate with the experts who were appointed at the prosecution's request.[16] As other circuit courts have noted:

> It would be a strange situation, indeed, if first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense, and, second, if the government is to have the burden of proof—and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.

United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968), *quoting Pope v. United States*, 372 F.2d 710, 720 (8th Cir. 1967), *vacated and remanded on other grounds*, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). This court made a similar observation in the context of a federal prosecution:

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16. In federal courts, such refusal could result in the exclusion of any expert testimony offered by the defendant on the issue of his mental state. *See* Fed.R.Crim.P. 12.2(d).

> [T]he government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects—including, perhaps, the testimony of psychiatric experts offered by him—who has had the opportunity to form a reliable opinion by examining the accused.

United States v. Cohen, 530 F.2d 43, 48 (5th Cir. 1976) (footnote omitted). Hence, we hold that Granviel is not entitled to habeas relief on the attorney-client and Sixth Amendment grounds.[17]

[6] Granviel finally urges that he was deprived of his Sixth Amendment right of confrontation by the introduction of hospital records containing diagnostic opinions. These records were presented by the State to rebut defense evidence that Granviel had been hospitalized for insanity.

Texas recognizes the business records exception to the hearsay rule, Tex.Rev.Civ.Stat.Ann. art 3737e, and applies it in criminal as well as civil cases, *Coulter v. State*, 494 S.W.2d 876 (Tex.Cr.App. 1973). Granviel complains that the state did not strictly adhere to the procedural requirements of art. 3737e, and, further, that the diagnostic opinion in question lacked the requisite trustworthiness. However, at the trial, defense counsel

17. We note that the issues of the Fifth Amendment privilege against compelled self-incrimination and the Sixth Amendment right to counsel which underlie the Supreme Court's recent decision in *Estelle v. Smith*, ___ U.S. ___, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), are not involved here. Granviel and his attorneys were certainly aware that the prosecution intended to call Dr. Holbrook as a witness and they knew of the conclusions and the expert opinion to which he would testify. Further, Granviel was in no way compelled to submit to the examination by Holbrook.

merely objected to the admission of the evidence on the ground that it was "hearsay." The Texas Court of Criminal Appeals held this objection insufficient, 552 S.W.2d at 121–22, citing its previous opinions in *Forbes v. State*, 513 S.W.2d 72 (Tex.Cr.App. 1974); *Williams v. State*, 531 S.W.2d 606 (Tex.Cr.App. 1976) (objection must be contemporaneous); and *Bouchillon v. State*, 540 S.W.2d 319 (Tex.Cr.App. 1976) (objection too general properly overruled). Granviel having failed to demonstrate "cause" and "prejudice" in connection with the inadequate objection, *see Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), habeas corpus relief was properly denied on this ground.

Accordingly, petitioner's death sentence must be set aside, and the judgment of the district court is reversed insofar as it leaves the death sentence in effect. In all other respects the judgment is affirmed. The case is remanded to the district court with directions that the State of Texas determine within a reasonable time whether (1) to conduct a new sentencing proceeding in the manner provided by state statute, or (2) to vacate petitioner's sentence and impose a sentence less than death in accordance with state law.[18]

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

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18. *Marion v. Beto*, 434 F.2d 29 (5th Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S.Ct. 1372, 28 L.Ed.2d 646 (1971).

APPENDIX

DONALD L. HARRISON

Q: (By Prosecutor) The defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary.

Now, do you have conscientious scruples against the infliction of the death penalty as a punishment for crime?

A: I don't know what that means.

Q: Let me ask you if you, personally sitting as a Juror, could ever vote so as to inflict the death penalty?

A: No, I don't think I could.

Q: That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.

A: (Venireman nods.)

Q: Okay, you could not?

A: No. I could not.

MR. WILSON: We challenge, Your Honor.

THE COURT: The defense have any objections?

MR. DICKENS: We don't have any questions.

THE COURT: All right.

The Court feels that the State's challenge for cause is qualified in this cause and supported by the evidence.

You will be excused, then, Mr. Harrison. Thank you very much. (R. 711–12).

HOMER N. LIPSCOMB

Q: (By Prosecutor) . . . There are only two possible punishments for capital murder, and that is life or death.

Now, bearing in mind the fact that this is a capital murder situation, I will ask you whether or not you have any conscientious or religious scruples against the imposition of the death penalty in a proper case?

A: I'm not very religious but I do have. I am kind of against the death penalty.

Q: Kind of against the death penalty. I appreciate your candor, and of course that is why we need to ask you these questions.

When you say you are kind of against the death penalty, what do you mean by that?

A: I mean it would have to be, you know, I really don't know what I am, but I just wouldn't want to be a part of it.

Q: I understand that.

Of course, nobody thinks it's a very pleasant occasion, nobody thinks that it's something they would particularly want to do, but the question is, of course, whether or not you yourself could personally take part in making decisions which you knew would result in the death of a human being.

A: I don't think I would.

Q: You don't think you could?

Well, you understand I have no argument with that position, but it's necessary that we find out exactly how you feel about it.

Is what you are saying that you have personal and deep-seated feelings which would prevent you from rendering a decision which would result in the death of a person in any case whatsoever?

A: I don't feel like I am that kind of a judge.

Q: You don't think you could imagine any sort of case in which you feel the death penalty would be justified, then?

A: No.

Q: By that you mean you would automatically vote against the infliction of the death penalty, no matter what the facts were in a particular case?

A: I might consider it, but I automatically would right now.

Q: You would automatically vote against the imposition no matter what the trial would reveal?

A: Yes.

Q: And no matter what these facts reveal, no matter how terrible the crime might be, that would not be enough to cause you to set aside your personal deep convictions regarding this matter?

A: I wouldn't want that on my mind.

Q: And this is a firm conviction, I take it, from what you have said?

A: Yes.

Q: And it's the sort of conviction which you are not going to let anybody talk you out of, presumably something within yourself and of course you have to live with yourself and your convictions and it's something you believe in and you are not going to let anybody talk you out of that?

A: Yes.

Q: I appreciate you telling that, Mr. Lipscomb, and we do appreciate your candor.

MR. STRICKLAND: Your Honor, it's the position of the State these are sincere and deep seated convictions and as such we would challenge Mr. Lipscomb for cause.

THE COURT: The challenge is granted under the authority of *Witherspoon* in (sic) Illinois. (R. 809–11).

INEZ WALLACE

Q: (By Prosecutor) . . . I'd like to ask you now whether you personally have any conscientious or religious scruples against the imposition of the death penalty in a proper case?

A: Well, the truth. I don't know exactly how I feel in that way.

Q: Of course, I can understand that. It's a serious point, but it's something we need to talk about because obviously if we are only faced with two possible alterna-

tives, we need to make sure we have jurors that are able to consider both of those alternatives.

Have you been able to give it some thought? Have you thought about this question, say, before you came over here on jury service?

A: Well, I do believe in the Bible and I don't think no one should kill anyone.

Q: Okay. Let's talk about that, if I may, for a while. You say, 'I believe in the Bible,' and you believe in the things that it teaches you and no one should kill. By that are you saying you don't feel that you could give consideration to the death penalty regardless of what the facts might show in a case?

A: Well, I believe I could do that.

Q: You believe you could consider the death penalty and you don't feel that would in any way conflict with your religious feelings; is that right?

MR. DICKENS: I'm going to object. That is an improper question, whether it would be in conflict with religious feelings. Certainly perhaps the death penalty might be.

THE COURT: Sustained.

MR. STRICKLAND: If I may make a statement to that. I think *Witherspoon* allows us to inquire as to whether they have religious scruples and that is the point of my inquiry.

THE COURT: I agree it is.

BY MR. STRICKLAND:

Q: Now, understanding that, I assume that no one would like to be involved in a death penalty situation, that is, it's not a pleasant task for anybody, you understand that, but what I need to know is whether you yourself could personally take part in a trial and personally make decisions which might result in the death of another human being?

A: I don't think I could.

Q: You don't think you could. Well, you understand I don't have any quarrel with that position. All we need to do is we need, if that is your conviction and those are your deep and sincere feelings, well, of course, you are certainly entitled to those.

Are you saying, then, you have a deep-seated feeling that would prevent you from being able to take part in rendering a death penalty?

A: Yes, sir, I just don't believe in it.

Q: You just don't believe in the death penalty? Regardless of what the facts are, you just don't believe people ought to take another person's life?

A: I don't know what else to say. I just don't . . .

Q: I understand, number one, it may be sincere feelings and number two, I realize it may be something you haven't really had to experience before. You have thought about it but you haven't had to say anything. Well, you have just told me you don't think you believe in the death penalty and question I would have is are your feelings of such a nature or are your feelings so deep that no matter what the facts were, you just would not be able to give another person the death penalty or consider it?

MR. DICKENS: I object. The most the State can demand is a person be willing to consider all the penalties, Your Honor, and I object for that reason, and the way he phrases that question.

THE COURT: Overruled.

BY MR. STRICKLAND:

Q: Should I ask the question again, or did you understand?

A: What was the question?

Q: Well, let me ask it this way: Are you saying that the feelings you have and what you have already told us about these feelings you have that people should not take another person's life, are those feelings such no matter what you heard in a trial like this, no matter what you heard, you could be able to even consider giving a person the death penalty? You would just say, 'No, I'm sorry. I am just not going to take part in that'?

A: I don't know. That is kind of hard.

Q: I understand.

Well, of course, you understand that both sides and of course the Defendant, also, need to know if you would just automatically say you would not consider one of these, that is what we need to know and what is the purpose of us talking here this afternoon.

MR. SULLIVAN: Your Honor, I would object to this continual line of repetitive questioning. This Venirewoman has testified she could consider the death penalty if the facts warranted it; therefore the question of the Prosecutor is improper and repetitious.

THE COURT: Overrule the objection.

MR. SULLIVAN: Please note my exception.

BY MR. STRICKLAND:

Q: Now, you understand if that is the way you feel—as I indicated, I don't have any quarrel with the way you feel, but all we need to know is precisely how you do feel and if I misunderstood you, set me straight. I thought you said you did not feel that you could participate in a trial in which the death penalty might be inflicted upon somebody? Did I understand you right?

A: Well, I say that is just how I feel. I wouldn't like to participate in it.

Q: Let me ask you this: Nobody would like to, I figure nobody really would like to be involved in something like that, but could you be involved? Would you set aside your feelings and just say, 'Well, I'm going to go ahead anyway and do it,' or are those feelings so strong you'd say, 'Well, I am not going to be involved'?

A: I just don't think I could.

Q: And this is a pretty deep and firm conviction you have; is that correct?

A: (Venirewoman nods.)

Q: And you are not going to let anybody talk you out of that conviction, I presume? Is that pretty right? Something you believe in and you are just not going to let anybody talk you out of that? You are going to stand for what you believe in?

A: (Venirewoman nods.)

MR. STRICKLAND: Your Honor, the State would challenge for cause on the basis of the witness'es (sic) testimony.

THE COURT: Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes; is that right?

VENIREWOMAN WALLACE: Yes.

THE COURT: All right.

I know it's not an easy thing for you to go through here. The challenge for cause is sustained.

Do you understand, Mrs. Wallace, nobody is unhappy with you.

You have been excused, Mrs. Wallace.

(Whereupon, Juror number thirty-six excused.)

MR. SULLIVAN: Your Honor, would the Court take judicial notice that Mrs. Inez Wallace was a Negro female?

THE COURT: Yes, the Court will. (R. 1057–63).

MRS. ROY F. COX

Q: (By Prosecutor) . . . Now Mrs. Cox, the punishment for capital murder which is the offense that this Defendant is charged with is only one of two things and that is by confinement in the penitentiary for life or death in the electric chair, and I would like to ask you at the outset whether or not you have any conscientious scruples against the infliction of the death penalty as a punishment for crime in a proper case?

A: Yes, I do.

Q: Mrs. Cox, is that such a deep-seated feeling that you have that regardless of the facts in the case that you personally acting as a juror could never vote to assess the death penalty; is that correct?

A: That's correct.

Q: I take it, then, Mrs. Cox that because of these feelings that you have and you are entitled to them, that you would automatically exclude the death penalty from any case you were sitting on as a punishment? You just wouldn't do it?

A: I don't think I could with all due consideration.

Q: Regardless of the facts of the case, and I'm not trying to badger you about it, but regardless of the facts of the case you just couldn't do it; is that correct?

A: Well, I would feel I was contributing to a death and I think that is wrong.

MR. WILSON: Your Honor, we would challenge for cause.

THE COURT: Challenge is sustained.

Mrs. Cox, you are excused. You may go back home, now. (R. 1086–87).

MATTIE D. VERNON

Q: (By Prosecutor) . . . Do you have any conscientious scruples against the death penalty as a punishment for crime?

A: I don't know.

Q: Well, could you personally acting as a juror vote in such a way that the death penalty would be inflicted?

A: What do you mean?

MR. DICKENS: I will object to that as being an improper question. The question is whether or not she would unequivocally and automatically vote against it in every case.

THE COURT: Sustained.

Q: What we need to know is, Mrs. Vernon, whether you personally could ever vote to—in such a way that the death penalty would be inflicted or is your feeling such that you personally could not do that in any case?

A: I don't know. I will be honest. I don't know.

Q: Well, you see, the State is asking for the death penalty. That is why they made it known that we are asking for the death penalty.

MR. DICKENS: I am going to object. It's immaterial what they are asking for. It's whether or not she can consider all the punishment.

THE COURT: Overruled.

BY MR. WILSON:

Q: And the death penalty is one of the penalties that the law says can be voted by the jury in a capital case.

MR. SULLIVAN: Your Honor, I would object to that because the law doesn't say the death penalty can be voted by the jury. It's an incorrect statement of the law.

THE COURT: Overruled.

BY MR. WILSON:

Q: So, to be qualified as a juror you have got to be able to not just say if there is some punishment that the law allows, well, I just couldn't do that and if you couldn't, now is the time to tell us. There is a lot of people can't.

A: No, I don't guess I could because I mean a life is a life. You can't bring back a life. I just really don't know. I will be honest. I don't know.

Q: Yeah, but you think you couldn't because you could not bring back a life?

A: No, you couldn't.

Q: You would, then—you really would have religious, conscientious, or whatever you might call them, scruples against the death penalty, don't you?

A: Yes, I guess I would.

Q: Ma'am?

A: I just, I guess not. I really don't know. I will be honest, I don't know, because I have never been through this before. I don't know.

Q: I'm sorry. I thought you told me that a life was a life and you just couldn't be involved in taking a life even if it was by jury verdict.

A: Really I am serious. I just don't know.

Q: Well, as I say, Mrs. Vernon, I am sorry to have to push you, but we need to know and if you could not do

that, why now is the time to tell us and there is nothing wrong with it whatsoever.

A: No, I couldn't.

Q: You could not?

A: No, sir.

Q: And that is—I appreciate your telling us and do you tell us no matter what kind of case it was if you were the juror you couldn't vote to give the death penalty?

A: No.

Q: Okay.

I take it, Mrs. Vernon, and that is an affirmative opinion that you have.

A: Yes.

Q: All right.

MR. WILSON: We challenge, Your Honor.

THE COURT: All right.

The challenge is allowed and granted on the basis of *Witherspoon versus Illinois*.

Mrs. Vernon, you are excused from jury service.

(Whereupon, Juror number sixty-five excused.)

MR. DICKENS: For the purpose of the record, I am going to object to the exclusion of Mrs. Mattie Vernon on the grounds her questions (sic) were less than unequivocal and never did she say she would

automatically vote against the death penalty in every case and, I guess, on that grounds (sic) and I would further ask the Court to take judicial notice she was a black lady.

THE COURT: Objection is noted. Court does take judicial notice Mattie D. Vernon was a black female. (R. 1724–28).

HUNTER, District Judge, dissenting:

I dissent from the majority opinion, only insofar as it concludes:

"[T]hat Harrison's exclusion for cause constituted a *Witherspoon* violation."

The basic facts developed in the trial are set forth in the opinion of the Texas Court of Criminal Appeals in *Granviel v. State*, 552 S.W.2d 107, *cert. denied* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250. It is not disputed that Granviel, in two separate killing sprees, stabbed to death five women and two children. The sufficiency of the evidence to support the jury's verdict of guilty is not challenged by anyone.

Witherspoon involved a state procedure for selecting jurors in capital punishment cases, where the jury did the sentencing and had complete discretion as to whether the death penalty should be imposed. In this context the Court held that a state may not constitutionally execute a death sentence imposed by a jury culled of all those who reveal during voir dire examination that they had conscientious scruples against the death penalty. Most of the veniremen challenged for cause were excluded with no effort to ascertain whether their scruples would compel them to vote against capital punishment. The Court specifically defined the issue and noted:

> It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt.

Witherspoon v. Illinois, 391 U.S. 510 at 513, 88 S.Ct. at 1772. The Supreme Court has considered *Witherspoon* in numerous cases since that original opinion was handed down in 1968.[1] The most recent expression of the Supreme Court is found in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In an opinion written by Justice White, the Court, in making reference to this line of cases, stated:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

The majority holds that venireman Donald L. Harrison's exclusion for cause constituted a *Witherspoon* violation. The opinion concludes:

> "These questions and answers fall far short of an affirmation by Harrison that he would automatically vote against the death penalty, regardless of the evidence, or that his objections to capital punishment

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1. *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969); *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

would prevent him from making an impartial decision as to guilt."

We cannot agree. In analyzing the record I find that appellant's rights were fully protected, and that Harrison was properly questioned as to his commitment to vote against the death penalty. The relevant questioning and answering follows:

DONALD L. HARRISON

Q: (By Prosecutor) The defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary.

Now, do you have conscientious scruples against the infliction of the death penalty as a punishment for crime?

A: I don't know what that means.

Q: Let me ask you if you, personally sitting as a juror, could ever vote so as to inflict the death penalty?

A: No, I don't think I could.

Q: That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion.

A: (Venireman nods.)

Q: Okay, you could not?

A: No. I could not.

MR. WILSON: We challenge, Your Honor.

THE COURT: The defense have any objections?

MR. DICKENS: We don't have any questions.

THE COURT: All right.

The Court feels that the State's challenge for cause is qualified in this cause and supported by the evidence.

You will be excused, then, Mr. Harrison. Thank you very much. (R. 711-12).

Straightforward application of the *Witherspoon* line of cases as enunciated in *Adams* leads me to one self-evident conclusion: Harrison entertained reservations about capital punishment which would have prevented him from making an impartial decision as to defendant's guilt.[2] *Witherspoon* mandates no precise questions and answers. The test is "not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality."[3] While the mere demeanor of a venireman cannot contradict his express words so as to give them a meaning in opposition to that which they state, nevertheless, in those instances where the meaning is apparent, elements such as attitude and tone of voice are relevant factors in conveying the precise message intended.[4] The trial judge and counsel were present, with the opportunity to observe and further question Harrison. Here, we think the

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2. This was the narrow issue involved in *Witherspoon*, 391 U.S. 512 at 513, 88 S.Ct. 1772 at 1772. See also footnote 21, 391 U.S. 522, 88 S.Ct. 1777.

3. *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469.

4. *Tezono v. State*, 484 S.W.2d 374, 383-384 (Tex.Cr.App. 1972).

express words brought forth this message loud and clear: Harrison's attitude toward capital punishment would have prevented him from making an impartial decision on both the guilt and penalty facets of the trial. Moreover, the action of the trial judge (who had seen and heard) in excusing the juror, and appellant's counsel's failure to object, emphasize the appreciation of those who were present that Harrison's views concerning capital punishment would substantially impair the performance of his duties as a juror in this case.

There were five veniremen whose exclusion is challenged. The majority, having concluded that Harrison was improperly excused for cause, did not find it necessary to discuss the challenges to Lipscomb, Wallace, Cox and Vernon. The relevant voir dire examination of each is reproduced in the Appendix. *Lipscomb* stated that he would automatically vote against the imposition of the death penalty. *Wallace* affirmed that she did not believe in the death penalty and that her feelings were so strong that she could not be involved. *Cox* made no "bones" about it. She was opposed to the death penalty and she would never vote to assess it. *Vernon* equivocated when first questioned, before concluding that in the final analysis she could not vote to impose a death penalty. Each of these excluded veniremen made it "unmistakably clear" that they could not abide by Texas law as it related to the death penalty. They were thus properly excluded under *Witherspoon*.

In a larger sense, this case emphasizes the frustration of states in their effort to enforce their constitutionally valid capital punishment statutes. The majority holds that *Witherspoon* requires it to intervene to set aside the death penalty in this episode of murder, the nature of which all of us agree is so gruesome that we "gladly refrain from repeating." I think the conclusion is completely without support on the record.

The State of Texas had every right to insist that any juror whose views on capital punishment would substantially impair the performance of his duties as a juror be excused for cause. The State exercised that right and challenged five jurors. The trial court was imminently correct in sustaining each challenge.

In the opinion of this court, written by Judge Gee in *Burns v. Estelle*, 512 F.2d 1297 at 1302, we note this language:

> We cannot close without voicing our dissatisfaction at the unfortunate result to which logic and our lights on *Witherspoon* have driven us. Indeed, it is with something like agony—though only a pale shadow of what must have been felt by the victim of Burns' ghastly crime—that we intervene to set aside in part the operation of state policy and procedures aimed at preventing further atrocities of this kind. Nor do we retreat an inch from our observation in *Spinkellink v. Wainwright*[5] that "the State also enjoys the right to an impartial jury . . . and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution." After all, the prosecution speaks in some degree for Burns' helpless and pitiful victim and to that degree justly claims in his right.
>
> But the requirements of *Witherspoon* are clear, and the Supreme Court has made equally clear in later decisions that it will not countenance their grudging or ungenerous application.

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5. 442 U.S. 1301, 99 S.Ct. 2091, L.Ed.2d 649 (1980).

I appreciate the difficulty of any endeavor to synthesize a precise *Witherspoon* rule, but conclude, without hesitation, that a faithful observance of Supreme Court authority does not require this court to intervene and set aside the death penalty in this case.[6]

With deference, I dissent, and would dismiss the habeas petition in its entirety.

6. An examination of the facts of *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), 626 F.2d 396 *en banc* (1980), reveals clear distinctions. There, the prospective juror (Mrs. Doss) testified only that the presence of the penalty would "affect" her deliberations, with little or no indication of how profound that effect would be. Defense counsel desired to question her further; the trial court abruptly "cut off" further questioning. *Here*, Harrison stated that he did not think he could ever vote to inflict the death penalty, and in response to further questioning agreed that *he could not* vote to take another person's life. It is difficult to psychoanalyze a person's thinking, but the message from Harrison contains what I consider to be unequivocal avowals that he could not vote for the death penalty.

Appendix

81-1011

Office-Supreme Court, U.S.
FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

KENNETH GRANVIEL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX B

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH GRANVIEL

V. CIVIL ACTION NO.
CA-4-78-115

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS; AND
ROBERT COUSINS, WARDEN, ELLIS UNIT,
TEXAS DEPARTMENT OF CORRECTIONS

ORDER

After making an independent review of:

1. the pleadings, files and records in this case;

2. the findings, conclusions and recommendation of the United States Magistrate filed November 27, 1978; and

3. a de novo determination of those portions of the report and specified proposed findings and recommendations to which objection was made specifically including the Petitioner's Objections to Magistrate's Proposed Findings, Conclusions and Recommendations, I am of the opinion and find that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court. The findings and recommendation of the Magistrate shall be filed herein as a part of the record in this case.

Petitioner in his said Objections to Magistrate's Proposed Findings, Conclusions and Recommendations makes objection to the entire findings. However, other than his unsupported objections, Petitioner offers under

his Argument and Authorities support of his first issue of a *Witherspoon v. Illinois*, 391 U.S. 510 (1968) question with no mention of his other four issues.

Four of the five veniremen assertedly excluded in violation of the *Witherspoon* standard were properly excluded pursuant to *Witherspoon*, and as to the fifth venireman in question, Petitioner failed to make a contemporaneous objection that he was being excluded improperly thereby constituting a waiver.

IT IS ORDERED that this petition for writ of habeas corpus be and hereby is dismissed as to the Respondent Robert Cousins, and as to the Respondent W. J. Estelle, Jr. is denied.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this Order to

1. Petitioner Kenneth Granviel;

2. Frank Sullivan, Attorney for Petitioner;

3. Respondent Robert Cousins, Warden, Ellis Unit, Texas Department of Corrections;

4. Respondent W. J. Estelle, Jr., Director, Texas Department of Corrections;

5. Attorney General Mark White;

and information copies to

6. Honorable Tom Cave, Judge of the 213th District Court of Tarrant County, Texas, the trial judge; and

7. Honorable Tim Curry, District Attorney of Tarrant County, Texas, the prosecutor.

ENTERED this _____ day of _____, 1979.

_____

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH GRANVIEL

V. CIVIL ACTION NO.
CA-4-78-115

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS; AND
ROBERT COUSINS, WARDEN, ELLIS UNIT,
TEXAS DEPARTMENT OF CORRECTIONS

JUDGMENT

This action came on for consideration before the Court, Honorable Eldon B. Mahon, District Judge, presiding, and the objections of the Petitioner to the findings and recommendation of the magistrate having been duly considered and a de nove determination having been duly rendered as set forth in the Order entered this date.

IT IS ORDERED and ADJUDGED that this Petition for Writ of Habeas Corpus be dismissed and denied for the reasons set forth in the findings, conclusions and recommendation of the magistrate and adopted as the findings and conclusions of the Court as set forth in said Order.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this final Judgment to Petitioner and Respondents.

ENTERED this 26 day of January, 1979.

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH GRANVIEL

V. CIVIL ACTION NO.
CA-4-78-115

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS; AND
ROBERT COUSINS, WARDEN, ELLIS UNIT,
TEXAS DEPARTMENT OF CORRECTIONS

FINDINGS, CONCLUSIONS
AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE

Pursuant to the provisions of Title 28, United States Code, Section 636(b), and Miscellaneous Order No. 6 of the Court in implementation thereof filed in the Dallas Division on July 1, 1977, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the United States Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case

This is a petition for writ of habeas corpus relief by a state inmate pursuant to Title 28, United States Code, Section 2254.

Parties

Petitioner Kenneth Granviel is presently confined at the Ellis Unit of Texas Department of Corrections at Huntsville, Texas, awaiting execution for the offense of killing a two year old girl while in the course of committing rape on her aunt. An Order Staying Execution "pending application and until further order of this Court" was entered on March 29, 1978, staying the scheduled execution of Petitioner on April 7, 1978.

Respondents are: (1) W. J. Estelle, Jr., who is the Director of the Texas Department of Corrections; and (2) Robert Cousins, who is the Warden of the Ellis Unit of the Texas Department of Corrections.

History of State Case

Petitioner was indicted on May 6, 1975, in Cause No. 4111 in District Court No. 213, Tarrant County, Texas, for the offense of killing a two year old girl while in the course of committing rape on her aunt.

Petitioner, represented by appointed counsel, on October 6, 1975, entered pleas of not guilty and not guilty by reason of insanity. The case proceeded to trial before a jury with the jury returning on October 24, 1975, a verdict:

1. that Petitioner "was sane at the time of the alleged commission of the offense charged"; and

2. that beyond a reasonable doubt Petitioner is guilty of the offense of capital murder.

Additionally, the jury answered two special verdict questions as follows:

SPECIAL VERDICT NO. 1

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: *YES*

SPECIAL VERDICT NO. 2

> Do you find from the evidence beyond a reasonable doubt that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: *YES*

On November 6, 1975, the Court assessed punishment on the jury verdict of guilty of capital murder as ". . . being mandatory that your punishment be death. . . ."

The judgment and sentence was affirmed by the November 10, 1976, opinion of the Texas Court of Criminal Appeals in *Granviel v. State*, 552 S.W.2d 107 (Tex.Crim. App. 1976), *cert. denied* 97 S.Ct. 2642 (1977).

The basic facts developed in the trial are set forth in *Granviel v. State, id.* at pages 110-112:

The offense is capital murder under V.T.C.A., Penal Code, Sec. 19.03(a)(2); the punishment, death.

Appellant was charged with the killing of Natasha McClendon while in the course of committing rape on another person. The sufficiency of the evidence to support the jury's verdict of guilty is not challenged. The record reflects that on October 7, 1974, appellant left work at 8:00 p.m. and drove to his apartment, where he watched the first half of a televised football game with his roommate. Appellant then decided to "go riding" because he wasn't enjoying the game. He drove through his apartment complex to the McClendon apartment, which was located in the same complex. While driving around the block, appellant "got this urge to have sex" with Laura McClendon, although they had never had intercourse previously. Appellant testified he had known the McClendon girls[1] for approximately three years. He parked his car in front of the McClendon apartment and remained seated in it for several minutes. Through the open window of the apartment, he was able to see Laura inside.

At approximately 10 p.m. appellant walked up to the apartment and found the front door open. Appellant knocked and Laura invited him in. After some conversation, appellant asked for a drink of water.

/. Laura and Martha McClendon were sisters. Linda McClendon was a cousin.

At that point, he was only interested in finishing the water and leaving. However, he returned the glass to the kitchen where Laura was cleaning the stove and her small son [Steven] was playing. Appellant then walked up behind Laura and placed a knife, which he had brought with him, to her throat. Appellant assumed Laura thought he was kidding. He told her to place her arms around him and smile so that Steven wouldn't be nervous.

Appellant, Laura and Steven walked toward Laura's bedroom with appellant locking the front door and closing the curtains on the way. Laura then told appellant that he "didn't have to take it" at which time he put the knife in his back pocket. Appellant had Laura tie her son with a telephone cord appellant had ripped from the wall when Steven started crying. Next appellant tore a bedsheet in strips and bound and gagged both Steven and Laura. Appellant then laid Laura and Steven "face down" on the bed, at which time Martha and her two year old daughter Natasha entered the apartment with her cousin Linda.

After calling, "Where is Laura?" Martha entered the bathroom. Natasha entered Laura's bedroom, saw appellant and ran to join her mother in the bathroom. At that time appellant covered Laura and Steven with a bedspread and Linda entered the room. Appellant showed her the knife and instructed her to lie down beside Laura on the bed.

Meanwhile, Martha left the bathroom and went into the livingroom. Appellant walked up behind her and grabbed her, throwing her on her head. Appellant then took Martha to her bedroom and bound her. He returned her to Laura's bedroom where he bound and gagged the remaining members of the McClendon family. Appellant then left the apartment and moved his car.

Upon reentering the apartment, appellant took Laura to the back [Martha's] bedroom and began removing her clothes. At this point he cut Laura on the inner thigh with his knife. Steven began crying and appellant placed him on a trunk in a closet of Laura's room. Laura told appellant that Steven needed his asthma medication which appellant then gave him. Appellant raped Laura, after which they sat and talked for about an hour.

Steven began crying so appellant stabbed him several times, thereby breaking his knife. While appellant was stabbing Steven, someone knocked on the front door. Appellant went to the kitchen for another knife and threw the handle of the broken knife into the trash can and the blade into the sink.

Following a second conversation with Laura, appellant brought Martha to the back bedroom, where he cut her on both arms and raped her. Appellant returned to Laura's bedroom for Linda; she wasn't breathing at that time. Appellant then stabbed Linda several times. Natasha began "hollering" so appellant stabbed her

several times as she lay on the floor between the bed and the dresser. He then "threw her on the bed" and stabbed her again.

Appellant returned to the back bedroom and talked with Laura before he began stabbing Martha and then Laura. Appellant then went through the women's purses and removed their money. He left the apartment, leaving the second knife in the back bedroom. Laura, Linda, Martha, Natasha and Steven McClendon died as the result of these injuries.

Approximately four months later [February 8, 1975] appellant spent the day playing cards with friends. Not long after he returned to his apartment, Betty Williams knocked on his front door and asked to use the telephone. Afterwards, she asked appellant if he had smoked someone else's cigarettes that afternoon by mistake. Appellant threw her half a pack, but as she opened the door and started to leave he "had an urge". Appellant suggested she take a full pack and told her it was in the bedroom. As Betty looked for the cigarettes, appellant walked up behind her, grabbed her, and "turned her upside down on her head." She appeared dazed and appellant began removing her clothes.

At that point, Vera Hill, the woman with whom appellant lived, began to unlock the apartment door. Appellant took a knife from the kitchen and stabbed Vera until she fell. He returned to the bedroom and was attempting to rape Betty when he heard a

knock on the door. He choked Betty to quiet her and then told his friend at the door to return later, because he [appellant] and Vera were fighting. Appellant moved Vera's body to the kitchen so it could not be visible from the front door. Another knock on the front door went unanswered and appellant returned to the bedroom and raped Betty. In order to keep Betty quiet, appellant "tried to wrap her chin and neck around the bed post." He then stabbed her and struck her head with a hammer. Vera Hill and Betty Williams both died from the injuries they received.

Appellant left his apartment after attempting to eat a sandwich and drove in his car for a while, ending at Wanda Hanson's apartment. Wanda was not home, so appellant asked her mother, Lizzie Phillips, if he could use her phone. Mrs. Phillips allowed appellant into the apartment, following which he bound Mrs. Phillips and her two grandchildren. Appellant placed the small boy in a closet and was in the process of raping Mrs. Phillips when Wanda's sister knocked on the front door. Appellant found a gun under Mrs. Phillips' mattress and held it to the head of the entering woman. He directed her to the bathroom and allowed her to keep her son and daughter with her. Appellant also brought the baby its bottle.

Appellant took Mrs. Phillips to the livingroom and raped her. He then went to the door and motioned for the daughter's husband to come inside. The man was led to a closet and Mrs. Phillips was again taken to her bedroom and raped.

> In the course of the third rape of Mrs. Phillips, Wanda and her boyfriend entered the apartment. Appellant announced that he and Wanda were going for a ride and ordered her family not to call the police for 12 hours because by that time he would have turned himself in.
>
> After going to his apartment, appellant and Wanda drove to Rev. R. L. Spearman's home and the three of them proceeded to the police station where appellant gave statements concerning both incidents.

Pleadings Submitted and Orders Entered

Petitioner submitted several instruments to the United States District Court for the Southern District of Texas in a cause styled *Kenneth Granviel, Petitioner* v. *W. J. Estelle, Jr., Director, Texas Department of Corrections, and Robert Cousins, Warden, Ellis Unit, Texas Department of Corrections* as follows:

> 1. Petition for Writ of Habeas Corpus by a Person in State Custody consisting of nine (9) typewritten pages bearing a date of March 2, 1978, plus twenty-nine (29) pages of exhibits;
>
> 2. Petitioner's Motion to Proceed in Forma Pauperis consisting of two (2) typewritten pages sworn to on March 2, 1978;
>
> 3. Motion Requesting the Court to Appoint an Attorney to Represent Petitioner consisting of two (2) typewritten pages sworn to on March 2, 1978;

> 4. Application for a Stay of Execution consisting of one (1) typewritten page dated March 2, 1978; and
>
> 5. Memorandum of Law in Support of Petitioner's Application for a Stay of Execution consisting of eight (8) typewritten pages.

These instruments were filed on March 15, 1978, in Civil Action No. H-78-487 in the Southern District of Texas.

On March 24, 1978, the one-page Memorandum and Recommendation of United States Magistrate Norman W. Black was filed.

On March 27, 1978, Respondent's Motion for Transfer was filed.

By March 27, 1978 Order, United States District Judge Robert O'Conor, Jr., transferred said cause to the United States District Court for the Northern District of Texas, where it was docketed as Civil Action No. CA-4-78-115.

United States District Judge Eldon B. Mahon by a March 29, 1978 Order Staying Execution granted

> . . . petitioner's Application for a Stay of Execution . . . pending final disposition of the habeas corpus application and until further order of this Court. . . .

Judge Mahon in an April 7, 1978 Order Permitting Proceeding in the District Court in Forma Pauperis and/or Order Specifying Further Action to Be Taken by the Clerk, permitted Petitioner to proceed in forma pauperis and referred the action to Magistrate McGlinchey.

In an April 7, 1978 Order Appointing Attorney, Judge Mahon appointed Frank Sullivan to represent the Petitioner in this case.

An Order to Show Cause and Notice and Instructions to Parties was entered by Judge Mahon on April 7, 1978.

On April 17, 1978, a Motion to Dismiss was filed on behalf of the Respondent Robert Cousins.

On April 21, 1978, Tim Curry, Criminal District Attorney of Tarrant County, Texas filed:

1. Motion to Dismiss, and

2. Motion to Require Petitioner to Peruse the Record and Raise all Possible Grounds.

On April 24, 1978, Respondent's Motion to Dismiss and Answer was filed on behalf of the Respondent W. J. Estelle, Jr.

On September 15, 1978, the remainder of the state record in this case being approximately eighteen (18″) inches of material was received.

Respondent Robert Cousins

The Respondent Robert Cousins is the Warden of the Ellis Unit of the Texas Department of Corrections. In an April 17, 1978 Motion to Dismiss, Respondent Cousins points out that he should be dismissed since he is not a proper party, and that the state officer having custody of the Petitioner is the Respondent W. J. Estelle, Jr., Director of the Texas Department of Corrections. See Rule 2(a), Rules Governing Section 2254 cases. The Motion to Dismiss the Respondent Cousins on the ground that he is not a proper party is meritorious, accordingly,

these findings, conclusions and recommendation *infra* shall deal with the remaining Respondent Estelle.

Issues Presented

Petitioner in his said Petition for Writ of Habeas Corpus presents five issues for consideration:

FIRST

Petitioner's Sixth and Fourteenth Amendment rights were violated by the exclusion of prospective jurors on the basis of general opposition to the death penalty.

(a) The Following veniremen were improperly dismissed.

1. Donald L. Harrison, (R. 708–712)
2. Homer N. Lipscomb, (R. 803–811)
3. Inez Wallace, (R. 1052–1063)
4. Mrs. Roy F. Cox, (R. 1082–1087)
5. Mattie D. Vernon, (R. 1719–1728)

The voir dire examination of each of the above veniremen is found in the record at the pages indicated by each name.

(b) The Texas Court of Criminal Appeals held that Petitioner waived error by not objecting to the exclusion of Veniremen Harrison, Lipscomb, Wallace and Cox. [Exhibit "B", *Granviel v. State*, 552 S.W.2d 107 (Tex.Crim.App. 1976) pp. 112, 113, 114]

1. The Texas Court of Criminal Appeals did not determine whether the four veniremen were excused in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) but held that the exclusion was waived because there was not a contemporaneous objection to their exclusion.

2. Petitioner was denied effective assistance of counsel due process of law under the Sixth and Fourteenth Amendments to the United States Constitution because of such rulings by the Texas Court of Criminal Appeals.

aa. Petitioner's trial counsel were following precedent of the Texas Court of Criminal Appeals when they did not object to the exclusion of the veniremen. *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975).

bb. The Texas Court of Criminal Appeals committed constitutional error by applying *Boulware v. State*, 542 S.W.2d 677 (Tex.Crim.App. 1976), retroactively to Petitioner's case when it overruled *Hovilla*, supra, in *Boulware* at p. 683.

cc. Petitioner has shown "cause" for not objecting contemporaneously to the exclusion of the Veniremen during voir dire examination.[2]

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2. Record on Writ of Habeas Corpus, Cause No. C-213-156, in the 213th District Court, Tarrant County, Texas, September 6, 1977, pp. 32-61.

dd. Where improper exclusion of veniremen results in assessment of the death penalty, prejudice is presumed.

SECOND

Petitioner's Sixth Amendment rights to effective assistance of counsel and his Fourteenth Amendment rights to due process and equal protection were violated by the action of the trial court in compelling Petitioner's own psychiatrist to testify against him suring the guilt-innocent stage of his trial.

(a) Petitioner's psychiatrist became a State witness, (R. 111-120, 2959-2981, 3372-3376, 3380-3383, 3392-3394).

(b) The psychiatrist was Petitioner's attorneys' agent and was covered by the attorney-client privilege.

(c) No evidence was introduced by the State at the punishment phase of the trial, (R. 3259).

THIRD

Petitioner's Sixth and Fourteenth Amendment rights of confrontation were violated by the admission into evidence, under the Texas Business Records Act, of hospital records containing diagnostic opinions as to Petitioner's sanity, where Petitioner was afforded no opportunity of cross-examination.

(a) The diagnostic opinions were read to the jury, (R. 3155-3160).

(b) No evidence was introduced by the State at the punishment phase of the trial, (R. 3259).

FOURTH

Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel and his Fourteenth Amendment right to due process were violated by TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2), which has a chilling effect upon an accused's right to raise the defense of insanity, (R. 49, 70–72, 86).

(a) The evidence elicited during the guilt-innocent phase of the trial can be considered by the jury at the punishment phase of the trial.

(b) No evidence was introduced by the State at the punishment phase of the trial.

FIFTH

TEX. CODE CRIM. PROC. ANN., art. 37.071(b) is unconstitutional as applied to Petitioner under the Eighth and Fourteenth Amendments to the Constitution of the United States because such statute did not permit Petitioner's mental condition to be considered as a mitigating factor.

(a) Subsection (1) as applied permitted Petitioner's mental condition to be used as aggravating factors but not mitigating factors.

(b) Subsection (2) as applied permitted Petitioner's mental condition to be used as aggravating factors but not mitigating factors.

Respondent Estelle perceives the issues raised by Petitioner as:

> First. that his Sixth and Fourteenth Amendment rights were violated by the exclusion of prospective jurors on the basis of their general opposition to the death penalty.
>
> Second. that his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process and equal protection were violated by the action of the trial court in compelling Petitioner's own psychiatrist to testify against him during the guilt/innocence stage of his trial.
>
> Third. that he was denied the right of confrontation under the Sixth Amendment by the introduction of hospital records which were admitted under the Texas Business Records Act.
>
> Fourth. that he was denied his right to effective assistance of counsel and due process by the provisions of Article 37.071(b)(2) of the Texas Code of Criminal Procedure, which has a chilling effect on an accused's right to raise the defense of insanity.
>
> Fifth. that the death penalty in Texas is unconstitutional in the application of Article 37.071(b), Texas Code of Criminal Procedure, since such statute does not permit the mental condition to be considered as a mitigating factor.

First Issue. Exclusion of prospective jurors for cause for merely expressing scruples against the death penalty, rather than being irrevocably committed to vote against it.

Petitioner asserts that his Sixth and Fourteenth Amendment rights were violated by the exclusion of five prospective jurors in violation of the standards enunciated in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The Respondent answers no *Witherspoon ibid.* error exists, and by way of additional answer, an objection is necessary to preserve error without excusable omission and silent acquiescence constitutes waiver.

Initially, a need exists to determine whether one prospective juror was excluded for cause for merely voicing scruples against the death penalty. *Davis v. Georgia*, 429 U.S. 122 (1976).

The *Witherspoon* case at page 522 sets forth the permissible standard for exclusion of veniremen for cause on the ground of being irrevocably committed to vote against the death penalty as:

> . . . . a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. . . .

Petitioner asserts that veniremen improperly were dismissed under the test set forth in *Witherspoon v. Illinois, ibid.* The five veniremen dismissed for cause on the issue of scruples against the death penalty were:

1. Donald L. Harrison (R. 708–712)

Q. The Defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary.

Now, do you have conscientious scruples against the infliction of the death penalty as a punishment for crime?

A. I don't know what that means.

Q. Let me ask you if you, personally sitting as a Juror, could ever vote so as to inflict the death penalty?

A. No, I don't think I could.

Q. That is a definite prejudice or feeling that you have that you would not change? You just don't feel like you would be entitled to take another person's life in that fashion?

A. (Venireman nods.)

Q. Okay. You could not?

A. No, I could not.

MR. WILSON: We challenge, Your Honor.

THE COURT: The Defense have any objections?

MR. DICKENS: We don't have any questions.

THE COURT: All right.

The Court feels that the State's challenge for cause is qualified in this cause and supported by the evidence.

You will be excused, then, Mr. Harrison, Thank you very much.

(Whereupon, Juror number twenty was excused.)

2. Homer N. Lipscomb (R. 803-811)

Q. As the Court told you Monday when you first met here this is a capital murder case. What we mean by capital murder and how we get to a capital murder situation is this: We have a law in the state of Texas against murder and we have a law in the state, of course, against murder, and we have a law in the state against the crime of aggravated rape. Occasionally, however, we have a situation where both of these crimes occur at the same time as a single transaction, so we have a combination of murder and rape and when we have these two very serious offenses blended into one occurrence, then we mean simply this, and that is that the death penalty is a possibility. There are only two possible punishments for capital murder, and that is life or death.

Now, bearing in mind the fact this is a capital murder situation, I will ask you whether or not you have any conscientious or religious scruples against the imposition of the death penalty in a proper case?

A. I'm not very religious but I do have. I am kind of against the death penalty.

Q. Kind of against the death penalty. I appreciate your candor, and of course that is why we need to ask you these questions.

When you say you are kind of against the death penalty, what do you mean by that?

A. I ean it would have to be, you know, I really don't know what I am, but I just wouldn't want to be a part of it.

Q. I understand that.

Of course, nobody thinks it's a very pleasant occasion, nobody thinks that it's something they would particularly want to do, but the question is, of course, whether or not you yourself could personally take part in making decisions which you knew would result in the death of a human being?

A. I don't think I would.

Q. You don't think you could? Well, you understand have no argument with that position, but it's necessary that we find out exactly how you feel about it.

Is what you are saying that you have personal and deep-seated feelings which would prevent you from rendering a decision which would result in the death of a person in any case whatsoever?

A. I don't feel like I am that kind of judge.

Q. You don't think you could imagine any sort of case in which you feel the death penalty would be justified, then?

A. No.

Q. By that you mean you would automatically vote against the infliction of a death penalty, no matter what the facts were in a particular case?

A. I might consider it, but I automatically would right now.

Q. You would automatically vote against the imposition no matter what the trial would reveal?

A. Yes, I believe in punishment.

Q. You simply don't believe in that particular form of punishment; is that correct?

A. Yes.

Q. And no matter what these facts reveal, no matter how terrible the crime might be, that would not be enough to cause you to set aside your personal deep convictions regarding this matter?

A. I wouldn't want that on my mind.

Q. And this is a firm conviction, I take it, from what you have said?

A. Yes.

Q. And it's the sort of conviction which

you are not going to let anybody talk you out of, presumably something within yourself and of course you have to live with yourself and your convictions and it's something you believe in and you are not going to let anybody talk you out of that?

A. Yes.

Q. I appreciate you telling that, Mr. Lipscomb, and we do appreciate your candor.

MR. STRICKLAND: Your Honor, it's the position of the State these are sincere and deep-seated convictions and as such we would challenge Mr. Lipscomb for cause.

THE COURT: The challenge is granted under the authority of Witherspoon in (sic) Illinois.

Thank you for your service. You are excused. I'm going to release you at this time to go back to your home.

(Whereupon, Juror number twenty-three excused.)

3. Inez Wallace (R. 1052–1063)

Q. Now, as the Court told you on Monday when you were over here, this is a capital murder case. A capital murder case only has two possible penalties if the Defendant is found to be guilty. Either a death sentence or mandatory life in the penitentiary.

Do you understand that?

A. (Venirewoman nods.)

Q. You remember the Court also asked you to give some consideration to whether or not you felt, what is your personal feelings with regard to the imposition of the death penalty.

Do you remember when the Court asked you to think about that? I'd like to ask you now whether you personally have any conscientious or religious scruples against the imposition of the death penalty in a proper case?

A. Well, the truth. I don't know exactly how I feel in that way.

Q. Of course, I can understand that. It's a serious point, but it's something we need to talk about because obviously if we are only faced with two possible alternatives, we need to make sure we have jurors that are able to consider both of those alternatives.

Have you been able to give it some thought? Have you thought about this question, say, before you came over here on jury service?

A. Well, I do believe in the Bible and I don't think no one should kill anyone.

Q. Okay. Let's talk about that, if I may, for a minute.

You say, "I believe in the Bible," and you believe in the things that it teaches you and no one should kill. By that are you saying you don't feel that you could give consideration to the death penalty regardless of what the facts might show in a case?

A. Well, I believe I could do that.

Q. You believe you could consider the death penalty and you don't feel that would in any way be any conflict with your religious feelings; is that right?

MR. DICKENS: I'm going to object. That is an improper question, whether it would be in conflict with religious feelings. Certainly perhaps the death penalty might be.

THE COURT: Sustained.

MR. STRICKLAND: If I may make a statement to that. I think Witherspoon allows us to inquire as to whether they have religious scruples and that is the point of my inquiry.

THE COURT: I agree it is.

BY MR. STRICKLAND:

Q. Now, understanding that, I assume that no one would like to be involved in a death penalty situation, that is, it's not a pleasant task for anybody, you understand that, but what I need to know is whether you yourself could personally take part in a trial and personally make decisions which

might result in the death of another human being?

A. I don't think I could.

Q. You don't think you could. Well, you understand I don't have any quarrel with that position. All we need to do is we need, if that is your conviction and those are your deep and sincere feelings, well, of course, you are certainly entitled to those.

Are you saying, then, you have a deep-seated feeling that would prevent you from being able to take part in rendering a death penalty?

A. Yes, sir, I just don't believe in it.

Q. You just don't believe in the death penalty? Regardless of what the facts are, you just don't believe people ought to take another person's life?

A. I don't know what else to say. I just don't . . . .

Q. I understand, number one, it may be sincere feelings and number two, I realize it may be something you haven't really had to experience before. You have thought about it, but you haven't had to say anything. Well, you have just told me you don't think you believe in the death penalty and the question I would have is are your feelings of such a nature or are your feelings so deep that no matter what the facts were, you just would not be able to give another person the death penalty or consider it?

MR. DICKENS: I object. The most the State can demand is a person be willing to consider all the penalties, Your Honor, and I object for that reason, the way he phrases that question.

THE COURT: Overruled.

BY MR. STRICKLAND:

Q. Should I ask the question again or did you understand?

A. What was the question?

Q. Well, let me ask it this way: Are you saying that the feelings you have and what you have already told us about these feelings you have that people should not take another person's life, are those feelings such no matter what you heard in a trial like this, no matter what you heard, you could be able to even consider giving a person the death penalty? You would just say, "No, I'm sorry. I am just not going to take part in that"?

A. I don't know. That is kind of hard.

Q. I understand.

Well, of course, you understand that both sides and of course the Defendant, also, need to know if you would just automatically say you would not consider one of these, that is what we need to know and what is the purpose of us talking here this afternoon.

MR. SULLIVAN: Your Honor, I would object to this continual line of repetitive questioning. This Venirewoman has testified she could consider the death penalty if the facts warranted it; therefore, the question of the Prosecutor is improper and repetitious.

THE COURT: Overrule the objection.

MR. SULLIVAN: Please note my exception.

BY MR. STRICKLAND:

Q. Now, you understand if that is the way you feel—as I indicated, I don't have any quarrel with the way you feel, but all we need to know is precisely how you do feel and if I misunderstood you, set me straight. I thought that you said you did not feel that you could participate in a trial in which the death penalty might be inflicted upon somebody. Did I understand you wrong or did I understand you right?

A. Well, I say that is just how I feel. I wouldn't like to participate in it.

Q. Let me ask you this: Noody would like to, I figure nobody really would like to be involved in something like that, but could you be involved? Would you set aside your feelings and just say, "Well, I'm going to go ahead anyway and do it," or are those feelings so strong you'd just say, "Well, I am not going to be involved"?

A. I just don't think I could.

Q. And this is a pretty deep and firm conviction you have; is that correct?

A. (Venirewoman nods.)

Q. And you are not going to let anybody talk you out of that conviction, I presume? Is that pretty right? Something you believe in and you are just not going to let anybody talk you out of that? You are going to stand for what you believe in?

A. (Venirewoman nods.)

MR. STRICKLAND: Your Honor, the State would challenge for cause on the basis of the witness'es (sic) testimony.

THE COURT: Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes; is that right?

VENIREWOMAN WALLACE: Yes.

THE COURT: All right.

I know it's not an easy thing for you to go through here.

The challenge for cause is sustained.

Do you understand, Mrs. Wallace, nobody is unhappy with you.

You have been excused, Mrs. Wallace.

(Whereupon, juror number thirty-six excused.)

4. Mrs. Roy F. Cox (R. 1082–1087)

Q. Now, Mrs. Cox, the punishment for capital murder which is the offense that this Defendant is charged with is only one of two things and that is by confinement in the penitentiary for life or death in the electric chair, and I would like to ask you at the outset whether or not you have any conscientious scruples against the infliction of the death penalty as a punishment for crime in a proper case?

A. Yes, I do.

Q. Mrs. Cox, is that such a deep-seated feeling that you have that regardless of the facts in the case that you personally acting as a juror could never vote to assess the death penalty; is that correct?

A. That's correct.

Q. I take it, then, Mrs. Cox, that because of these feelings that you have and you are entitled to them, that you would automatically exclude the death penalty from any case you were sitting on as a punishment? You just wouldn't do it?

A. I don't think I could with all due consideration.

Q. Regardless of the facts of the case, and I'm not trying to badger you about it, but regardless of the facts of the case you just couldn't do it; is that correct?

A. Well, I would feel I was contributing to a death and I think that is wrong.

MR. WILSON: Your Honor, we would challenge for cause.

THE COURT: Challenge is sustained.

Mrs. Cox, you are excused. You may go back home, now.

(Whereupon, Juror number forty excused.)

5. Mattie D. Vernon (R. 1719–1728)

Q. Mrs. Vernon, the Judge told you that this is a capital murder case, and there is not but two punishments for the offense of capital murder and one of them is life imprisonment and the other one is death.

Now, without going into what capital punishment—I mean what a capital offense is right now, let me ask you: Do you have any conscientious scruples against the infliction of the death penalty as a punishment for crime?

A. I don't know.

Q. Well, could you personally acting as a juror vote in such a way that the death penalty would be inflicted?

A. What you mean?

MR. DICKENS: I will object to that as being an improper question. The question is whether or not she would unequivocally and automatically vote against it in every case.

THE COURT: Sustained.

BY MR. WILSON:

Q. What we need to know is, Mrs. Vernon, whether you personally could ever vote to—in such a way that the death penalty would be inflicted or is your feeling such that you personally could not do that in any case?

A. I don't know. I will be honest. I don't know.

Q. Well, you see, the State is asking for the death penalty. That is why they made it known that we are asking for the death penalty.

MR. DICKENS: I am going to object. It's immaterial what they are asking for. It's whether or not she can consider all the punishment.

THE COURT: Overruled.

BY MR. WILSON:

Q. And the death penalty is one of the penalties that the law says can be voted by the jury in a capital case.

MR. SULLIVAN: Your Honor, I

would object to that because the law doesn't say the death penalty can be voted by the jury. It's an incorrect statement of the law.

THE COURT: Overruled.

BY MR. WILSON:

Q. So, to be qualified as a juror you have got to be able to not just say if there is some punishment that the law allows, well, I just couldn't do that and if you couldn't, now is the time to tell us. There is a lot of people can't.

A. No, I don't guess I could because I mean a life is a life. You can't bring back a life. I just really don't know. I will be honest. I don't know.

Q. Yeah, but you think you couldn't because you could not bring back a life?

A. No, you couldn't.

Q. You would, then—you really would have religious, conscientious, or whatever you might call them, scruples against the death penalty, don't you?

A. Yes, I guess I would.

Q. Ma'am?

A. I just, I guess not. I really don't know. I will be honest. I don't know, because I have never been through this before. I don't know.

Q. I'm sorry. I thought you told me that a life was a life and you just couldn't be involved in taking a life even if it was by jury verdict.

A. Really I am serious. I just don't know.

Q. Well, as I say, Mrs. Vernon, I am sorry to have to push you, but we need to know and if you could not do that, why now is the time to tell us and there is nothing wrong with it whatsoever.

A. No, I couldn't.

Q. You could not?

A. No sir.

Q. And that is—I appreciate your telling us and do you tell us no matter what kind of case it was if you were the juror you couldn't vote to give the death penalty?

A. No.

Q. Okay.

I take it, Mrs. Vernon, and that is an affirmative opinion that you have?

a. Yes.

Q. All right.

MR. WILSON: We challenge, Your Honor.

THE COURT: All right.

The challenge is allowed and granted on the basis of Witherspoon versus Illinois.

Mrs. Vernon, you are excused from jury service.

(Whereupon, Juror number sixty-five excused.)

The State Trial Judge gave the Special Venire Jury Panel instructions as soon as they were seated including

You are going to be voir dired or asked questions individually in this case, in view of the fact this is a capital case. Capital cases, by the very nature of it, can result, if the Defendant is found guilty, in only one of two punishments. One of them is life in the penitentiary and the other one is death in the electric chair.

For that reason, you are asked questions by the State and by the Defendant individually, one at a time. I hope all of you will realize and understand the importance and seriousness of the proceeding in which we find ourselves today, and as you are called in to undergo your questioning by both the State and by the Defendant, to be perfectly open, honest, and above-board with the answers to all the questions that are asked of you. It's not anybody's intention to browbeat you and I will not allow that. These lawyers would not try it, anyway, but it will be thorough. So, as things occur, let us know what your feelings are,

> what your ideas are, and the various attitudes you hold about the questions that will be asked of you. (T. 161–162)

and

> . . . . You heard me say a few minutes ago there is a possibility if you are chosen as a juror in the trial in this case, you will be called on to answer certain questions in a certain way which will be resulted in the infliction of the penalty of death in this case. The attorneys while they are questioning you on voir dire will question very, very heavily on your feelings about that as to whether or not you could, could not, would, would not, be able to sit on a jury in which that was a possibility, being a part of your duty. I want you to think about your attitudes with that regard and also think about what you can or cannot do under the instructions of the Court of law, because the law is going to be given to you by the Court and you are going to be required to follow the law that is given you under the Court, whether you agree with it or whether you don't agree with it, just as I am required to follow the law and the attorneys are required to follow the law. (T. 166)

The voir dire examination of the prospective jurors clearly show that Homer N. Lipscomb, Inez Wallace, Mrs. Roy F. Cox and Mattie D. Vernon were excluded for cause on the ground of being irrevocably committed to vote against the death penalty pursuant to the teachings of *Witherspoon v. Illinois supra.*

The record shows that Donald L. Harrison was excluded for cause for merely voicing scruples against the

death penalty. Mr. Justice Rehnquist points out in his dissenting opinion in *Davis v. Georgia supra* at page 124

> . . . . the defect in this case is not that a juror was improperly excluded because she was not irrevocably opposed to the death penalty; rather, the defect is a failure to question sufficiently to determine whether or not she was irrevocably opposed. It is not inconceivable that a hearing with the excluded juror could be conducted now to finish the aborted questioning and determine whether she would have, in fact, been excludable for cause.

Determining that prospective juror Harrison was excluded for cause when the questioning did not fully develop the *Witherspoon* test, it becomes necessary to consider the answer of the Respondent Estelle that the silent acquiescence of Petitioner and his experienced counsel constitutes a waiver.

Does a procedural default of failing to contemporaneously object to the exclusion of prospective juror Harrison bar the *Witherspoon* claim of Petitioner? The Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit have discussed the contemporaneously objection rule in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Jiminez v. Estelle*, 557 F.2d 506, 510 (5th Cir. 1977), respectively, with the Fifth Circuit in *Jiminez* holding

> . . . *Sykes* mandates a holding that the Texas procedural rule is applicable to this case unless it falls within the exception that the failure of Jiminez's trial lawyer in the state court to object to the evidence of his prior uncounselled convictions, should be excused for cause, and that the error resulted in actual prejudice to him.

The prospective juror Harrison was excused for cause where the exact meaning of his answers cannot be ascertained with complete accuracy from the words of his answer alone. The able trial judge and counsel were present with the opportunity to observe and further question the venireman thus placing them in a superior position to ascertain meaning from his demeanor as was done by the trial judge as to a venirewoman when he noted, "Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes. . . ." (T. 1062); it follows that the ruling of the trial judge that the challenge for cause of venireman Harrison was "qualified in this cause and supported by the evidence" should not be disturbed without a clear showing of abuse of discretion. In a similar situation, the Texas Court of Criminal Appeals in *Tezeno v. State*, 484 S.W.2d 374, 383–384 (Tex.Crim.App. 1972) held:

> While the mere demeanor of the witness cannot contradict his express words so as to give them a meaning in opposition to that which they state, nevertheless, in those instances where the meaning is apparent, but is not stated as clearly as might be desired, elements such as demeanor and tone of voice, etc. are important factors in conveying the precise message intended. As was the case with Mrs. Norwood, appellant's counsel expressly waives objections,[2]

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2. Waiver of objection apparently will not, in itself, vitiate an improper challenge. It is, however, a factor to be considered in cases such as the one at bar, where the exact meaning of a venireman's answer cannot be ascertained with total accuracy from the words of his answer alone. The trial judge being present and having an opportunity to observe, the ruling of the trial court should not be disturbed in the absence of a showing of clear abuse of discretion.

and the court did not question the venireman. We do not feel that this Court, having only a "cold" record before us, can unequivocally ignore the actions of those present, in the fact of no express language by the venireman which would negate our conclusion, and in the face of language which, at the worst, is only lacking in force.

We cannot believe that Witherspoon v. Illinois, supra, requires certain formal answers and none other. We surely feel that the test of Witherspoon is "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[3]

We are aware of a large number of death penalty cases which have recently been reversed in memorandum opinions by the United States Supreme Court. (footnote omitted.) While it is difficult, if not impossible to synthesize a rule from those opinions, we have concluded that the voir dire in the instant case and the answers of the veniremen are more unequivocal than those which were set forth in the cases which have been reversed. (footnote omitted.) Nor is this a case where the veniremen's answers reflected only their feelings and not their ability to serve as fair and impartial jurors. See Grider v. State, 468 S.W.2d 393 (Tex.Cr.App. 1971).

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3. Ashe v. Swensen, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469.

Prejudice

The defect shown to this point is a failure to question the venireman Harrison sufficiently to determine whether he could have been excluded for cause pursuant to the *Witherspoon* standard; accordingly, Petitioner merely shows as a matter of speculation possible prejudice rather than a demonstrated reality.

The holding in *Davis v. Georgia, supra* conclusively binds this Court to the legal conclusion, whether correct or incorrect, that Petitioner as the record now stands was prejudiced when he was convicted of murder and sentenced to death by a jury where one of a potentially qualified class of jurors was excluded in violation of the standards enunciated in *Witherspoon v. Illinois, supra*; albeit regrettable the dissent and the opinion of the Supreme Court of Georgia finding no prejudice to Petitioner in an analogous factual situation appears the better reasoning and would be the determination this Court would make if free to do so. The Supreme Court of Georgia held:

> The rationale of Witherspoon and its progeny is not violated where merely *one* of a qualified class or group is excluded where it is shown, as here, that others of such group were qualified to serve. This record is completely void of any evidence of a systematic and intentional exclusion of a qualified group of jurors so as to deny the appellant a jury of veniremen representing a cross section of the community. *Davis v. Georgia*, 225 S.E.2d 214, 244–245 (Ga.Sup. Ct. 1976).

Cause

Wainwright v. Sykes, supra is a §2254 action in

which the inadmissibility of Petitioner's incriminatory statements by reason of his lack of understanding of the Miranda warnings is asserted.

The adequacy of state grounds—that the petitioner failed to make a contemporaneous objection that one venireman was excluded for cause in violation of *Witherspoon*—to bar federal habeas review is the issue presented here.

Mr. Justice White in *Wainwright v. Sykes*, *supra* points out

> . . . it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. Memphis*, 20 Wall. 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on because not presented in the manner prescribed by its *procedural* rules. The adequacy of such an independent state procedural ground to prevent federal habeas review of the underlying federal issue has been treated very differently than where the state-law ground is substantive. The pertinent decisions marking the Court's somewhat tortuous efforts to deal

with this problem are: *Ex parte Spencer*, 228 U.S. 652 (1913); *Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, *supra*; *Davis v. United States*, 411 U.S. 233 (1973); and *Francis v. Henderson*, 425 U.S. 536 (1976).

Query, would a Petitioner upon the same factual situation as Granviel, except that the situs of the crime was on a federal reservation with prosecution, and conviction presumably under Section 1111 of Title 18, United States Code, in federal court be permitted under Section 2255 of Title 28, United States Code, for the first time to challenge the exclusion for cause of a venireman on less than the *Witherspoon* standard?

Mr. Justice Steward in *Francis v. Henderson*, 425 U.S. 536, 541–542 (1976) answers in the negative that

> . . . the federal courts must give effect to these important and legitimate concerns in §2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions. Those considerations require that recognition be given "to the legitimate interests of both State and National Governments, and . . . [that] the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavor] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44. "Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to precedural defaults by federal defendants than to simi-

> lar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations." *Kaufman v. United States*, 394 U.S. 217, 228.

Prospective juror Harrison was excused for cause prior to being questioned sufficiently to determine whether he would have been excluded under the *Witherspoon* standard.

Petitioner failed to comply with the state contemporaneous-objection rule as to venireman Harrison although he did as to a venirewoman. He states as his cause for failure to observe the contemporaneous-objection rule that his counsel were relying on *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975) being the law and thus no objection was required to the exclusion of veniremen.

Attorney Charles Dickens testified as a witness for Petitioner in a September 6, 1977 state habeas hearing in Cause No. C-213-156 in the 213th District Court of Tarrant County, Texas, from pages 32 through 61, that: he is certified as a criminal law specialist by the Texas State Bar (T. 35); he had been practicing law "some 14 years at the time of this trial" (T. 56); with respect to veniremen Donald L. Harrison

> . . . there wasn't enough interrogation of him, really, to determine if he was qualified under Witherspoon. My opinion is that he was not disqualified when he was excused. (T. 58);

and he and his co-counsel

> deliberately did not object to these Witherspoon challenges because we felt we didn't have to under the law. (T. 60).

Counsel did object to the exclusion of venirewoman Mattie D. Vernon

> MR. DICKENS: For the purpose of the record, I am going to object to the exclusion of Mrs. Mattie Vernon on the grounds her questions were less than unequivocal and never did she say she would automatically vote against the death penalty in every case and, I guess, on that grounds and I would further ask the Court to take judicial notice she was a black lady.
>
> THE COURT: Objection is noted. Court does take judicial notice Mattie D. Vernon was a black female. (T. 1728).

The Fifth Circuit in *Dumont v. Estelle*, 513 F.2d 793 (5th Cir. 1975) dealt with a contemporaneous objection problem involving a Texas grand jury challenge. This circuit has extended *Davis v. United States*, 411 U.S. 233 (1973) on a state by state basis specifically including grand and petit jury attacks. The Court in its post-*Davis* decisions has

> . . . . settled at least two crucial points. First, though there can be evidentiary overlap, the *Davis* waiver doctrine—unlike the "considered choice" or "deliberate bypass" doctrine—does not turn on tactical considerations. In situations such as this, in which the *Davis* waiver doctrine otherwise applies, the foreclosure is automatic absent a showing of unconstitutionality in the waiver itself or "cause" amounting to actual prejudice. (footnote omitted). *See* Aaron v. Capps, M.D. Ala 1974 (Appendix to opinion of the Fifth Circuit), aff'd, *supra*, 507 F.2d 685, at pp. 687–688; Newman v.

Henderson, *supra*; Rivera v. Wainwright, *supra*. Second, we have held that reliance on a particular state of the law at the time of trial does not, by itself, constitute "cause" justifying excuse from the waiver. "Such a reliance reflects a miscalculation of law, not fact." Morris v. Sullivan, *supra*, 497 F.2d at 546. We think this rule must apply equally not only to reliance upon law affecting the *assertion* of purported constitutional rights, as in *Morris*, but also to reliance upon law *defining* constitutional rights. Otherwise, every time an arguably pertinent development in constitutional law offered a prisoner some faint hope of invalidating his conviction, the courts would face the complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. The answer in each case, turning on subtle degrees, would necessarily be haphazard, and its basis—whatever could be shown of the circumstances surrounding indictment in light of a tenuous and presumptuous appraisal of the law at the time—inherently unsatisfactory. The courts would be revisited by the same kinds of evils that our decisions under *Davis* have sought to remedy by removing these waivers from the tactical matrix. In consequence, we hold that the mere unencouraging status of the law at the time of trial is not *of itself* "cause" under *Davis* as to give rise to actual prejudice warranting relief from the waiver.

[7] No other cognizable "cause" having been demonstrated, it thus fell incumbent upon Dumont to show gross irregularity or manifest unfairness in the grand jury pro-

> ceedings which resulted in his indictment. The district court specifically found that Dumont had shown no *actual* prejudice in the return of the indictment by a grand jury composed of freeholders and householders. 377 F.Supp. at 383–85. The court also found that any prejudice was necessarily cured as the result of conviction by a fairly-drawn petit jury. *Id.* Dumont does not challenge those findings, but relies instead on the presumption of prejudice enunciated in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). This reliance is misplaced. As we explained in Newman v. Henderson, *supra*, the Supreme Court's decision in *Davis* holds that *actual prejudice* must be shown in order to excuse a statutory waiver resulting from a failure to assert the complaint in timely fashion. See the discussion in 496 F.2d, at 898–99. In conclusion, no judicially acceptable "cause" for relief has been shown.

Reliance on a particular state of the law at the time of trial does not constitute cause under *Davis* justifying excuse from the contemporaneous objection requirement of a challenge to the exclusion of a venireman in violation of the *Witherspoon* standard.

As Mr. Justice White points out in *Wainwright v. Sykes*, *supra* at 90:

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentuous event. A defendant has been accused of a serious crime, and this is

> the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

Petitioner and his counsel asked no questions of venireman Harrison thereby evidencing no desire for him as a juror and manifesting a conclusion that adequate questioning would develop a proper challenge for cause, otherwise, it is logical to conclude the astute defense would have questioned the venireman in an effort to force the prosecution to expend one of its preemptory challenges.

Habeas relief as the First Issue involving the exclusion of five veniremen assertedly in violation of the *Witherspoon* standard should be denied as to four of the veniremen because they were properly excluded pursuant to *Witherspoon*, and as to the venireman Harrison that Petitioner failed to maked a contemporaneous objection that one venireman was excluded for cause in violation of *Witherspoon* thereby constituting a waiver by Petitioner.

Second Issue. The Trial Court in compelling Petitioner's psychiatrist to testify against him in the guilt-innocence stage of the trial violated his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process and equal protection.

The Texas Court of Criminal Appeals in *Granviel v. State*, *supra* discuss this point at pages 114 through 117 as follows:

> [7] Appellant contends that the attorney-client privilege was violated by the State's subpoenaing and calling to the witness stand psychiatrist John T. Holbrook, who was appointed to examine appellant at the request of the appellant's court appointed counsel. Appellant contends that Dr. Holbrook was an agent of appellant's trial counsel because he was employed to assist them in the preparation of the defense in the trial. The appellant's only defense is that he was insane at the time of the commission of the offense.
>
> On the written request of appellant the court appointed Charles Dickens and Frank Sullivan, Esquires, practicing attorneys, to defend him on February 13, 1975. Appellant's counsel then contacted Dr. Holbrook, a psychiatrist, some time before April 26, 1975, and requested him to examine appellant in the Tarrant County Jail. These examinations were made on April 26 and May 16, 1975. Present at both examinations were the psychiatrist, appellant and counsel. Dr. Holbrook stated that appellant satisfactorily communicated with him and responded to his questions during the examination.

On May 22, 1975, upon counsel's written motion, the trial court appointed Dr. John T. Holbrook "to examine the defendant in the Tarrant County Jail at any and all times that are convenient both to Dr. John Holbrook and the Sheriff". On the same date the court upon appellant's counsel's written notice appointed Dr. M. Jerold May to administer psychological tests to appellant at his office in Fort Worth, which tests were made at a later date. On August 9, 1975, upon the State's request the court appointed Dr. Hugh Brown, a psychiatrist, to examine appellant at the Tarrant County Jail. Dr. Brown wrote the court of his inability to examine appellant because appellant refused to talk to him without his counsel being present. Dr. John Methner, a court appointed psychiatrist requested by the State, testified that on April 13, 1975, when he tried to examine the appellant in the presence of his counsel, he was unable to do so because appellant refused to talk to him or cooperate for the examination. Counsel stated that he did not have to talk to the psychiatrist (Dr. Methner); however, the psychiatrist did get to observe appellant for a while.

Art. 46.02, Sec. 2(f), V.A.C.C.P., as amended August 30, 1971, and effective at the date of the appointment of Dr. Holbrook on May 22, 1975, provides:

> "(1) The court may, at its discretion appoint disinterested qualified experts to examine the defendant with regard to his present competency to stand trial and as to his sanity, and to testify

> thereto at any trial or hearing in connection to the accusation against the accused . . .
>
> . . . .
>
> (4) No statement made by the defendant during examination into his competency shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding no matter under what circumstances such examination takes place.
>
> (5) any party may introduce other competent testimony regarding the defendant's competency."

Under this statute, the trial court's allowing Dr. Holbrook to testify was proper. "[A]ppoint disinterested qualified experts to examine the defendant . . ." clearly means that such expert is not appointed by the court as the expert of the State or the defense, but is the court's disinterested expert. He may appoint such expert at his discretion and without a motion therefore, and either party may subpoena such witness. Therefore, no attorney-client privilege exists as to Dr. Holbrook.

In *Stuliz v. State*, 500 S.W.2d 853, this Court said:

> "A psychiatric examination *is not an adversary proceeding*. Its purpose is not to aid in establishment of facts showing that an accused committed certain acts constituting a crime; rather, its sole purpose is to enable an expert to

form an opinion as to an accused's mental capacity to form a criminal intent.

Because of the intimate, personal and highly subjective nature of a psychiatric examination, *the presence of a third party in a legal and non-medical capacity would severely limit the efficacy of the examination . . .*" (Emphasis added)

Compare *Walker v. State*, 19 Tex. Crim.R. 176 (1885). See also *Gholson v. State*, Tex.Cr.App. 542 S.W.2d 395 (1976).

Art. 46.03, Sec. 3, V.A.C.C.P. effective June 19, 1975, provides as follows:

"(a) If notice of intention to raise the insanity defense if filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue, but the court may not order the defendant to a state mental hospital for examination without the consent of the head of the state mental hospital.

. . . .

(d) A written report of the examination shall be submitted to the court within 21 days of the order of examination and the court shall furnish copies of the report to the defense counsel and prosecuting attorney. The report shall include

a description of the procedures used in the examination and the examiner's observations and findings pertaining to the insanity defense.

. . . .

(g) The experts appointed under this section to examine the defendant with regard to the insanity defense also may be appointed by the court to examine the defendant with regard to his competency to stand trial pursuant to Section 3 of Article 46.02 of this code, provided that separate written reports concerning the defendant's competency to stand trial and the insanity defense shall be filed with the court."

Cf. Article 46.02, Sec. 3, V.A.C.C.P. (Incompetency to stand trial).

[8] A procedural statute controls litigation from its effective date. *Wilson v. State*, Tex.Cr.App., 473 S.W.2d532. The trial of the instant case was in October 1975, and Article 46.03, Sec. 3, supra, was then effective and controlling. *Wilson*, supra. Cf. *McCarter v. State*, 527 S.W.2d 296.

Articles 46.03 and 46.02, supra, negate the contention of appellant that the attorney-client privilege was violated. Both the State and appellant had the right to subpoena the psychiatrist and adduce his testimony at the trial. There is no difference in the result when the examinations were completed before the appointment was made, as in the instant case, and when a psychiatrist is appointed by the court and then makes his examination.

[9] Communications between a physician and his patient are not privileged under Texas Law. Texas has no statute establishing the privilege and the courts invariably deny its recognition. See *Bonewald v. State*, 157 Tex.Cr.R. 521, 251 S.W.2d 255.

The general rule is that communications between physicians and patients in the absence of statute are not privileged. *Dodd v. State*, 83 Tex.Cr.R. 160, 201 S.W. 1014, 1015.

Our statute does not exempt a physician and his patient relationship as privileged communications.

Art. 38.10, V.A.C.C.P., effective June 15, 1971, provides:

> "All other persons except those enumerated in Articles 38.06,[3] 38.101,[4] and 38.11,[5] whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by

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3. Art. 38.06 excepts insane persons, children or other persons who do not possess sufficient intellect to relate transactions and do not understand the oath.

4. Art. 38.101, Communications with persons in the treatment or examination of drug abusers, etc.

5. Husband or wife as witnesses against each other in criminal prosecutions.

his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship."

There is no affirmative evidence in the instant case showing that Dr. Holbrook revealed any fact or communication between him and appellant showing that appellant committed a *crime of any nature*. The testimony shows to the contrary that Dr. Holbrook never communicated to anyone in the district attorney's office any such statements or facts, if any, resulting from the examinations he made of appellant as to his sanity or his competency. Therefore, Article 46.02, Sec. 2(f)(4), supra, and Article 46.03, Sec. 3, supra, have not been violated.

Appellant claims that Dr. Holbrook's examination was necessary to his defense of insanity and failure to request the examination would have been ineffective assistance of counsel. Appellant contends that by employing Dr. Holbrook he created an involuntary State's witness who gave testimony adverse to appellant relating to Special Issue No. 2 under Article 37.071(b)(2), V.A.C.C.P. In view of our previous discussion of the status of Dr. Holbrook as a disinterested expert witness under Articles 46.02, Sec. 2(f) and 46.03, Sec. 3, this contention is without merit.

[10] Appellant further contends that the trial court erred when it ordered that

> the report of Dr. May, a psychologist appointed at appellant's request, be turned over to the State. This was proper under Article 46.03, Sec. 3(d), supra. Grounds of error four and five are overruled.

Dr. Holbrook's testimony omits any statements elicited from Petitioner in the psychiatric examination so no issue of self-incrimination exists.

The actual issue Petitioner presents here is succintly stated in *United States v. Alvarez*, 519 F.2d 1036, 1046–1047 (3rd Cir. 1975).

> . . . The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.

The attorney-client privilege and its possible extension to an expert witness in this Circuit is discussed in depth in *United States v. Pipkins*, 528 F.2d 559, 562–564 (5th Cir. 1976).

[1, 2] The attorney-client privilege prohibits the disclosure of the substance of communications made in confidence by a client to his attorney for the purpose of obtaining legal advice. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974); *Clanton v. United States*, 488 F.2d 1069, 1071 (5th Cir. 1974), *cert. denied*, 419 U.S. 877, 95 S.Ct. 140, 42 L.Ed.2d 116 (1974); *United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964); *J. P. Foley & Co. v. Vanderbilt*, 65 F.R.D. 523, 526 (S.D.N.Y. 1974). In appropriate circumstances the privilege may bar disclosures made by a client to non-lawyers who, like Somerford, had been employed as agents of an attorney. *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 40 (D.Md. 1974); *United States v. Schmidt*, 360 F.Supp. 339, 346 (M.D.Pa. 1973); 8 Wigmore, Evidence (McNaughton rev. 1961) § 2301.

[3, 4] The attorney-client privilege, however, is not a broad rule of law which interposes a blanket ban on the testimony of an attorney. To the contrary,

> . . . the privilege stands in derogation of the public's "right to every man's evidence", 8 Wigmore [McNaughton rev. ed. 1961] § 2192 at 70, and as "an obstacle to the investigation of the truth," *id.*, § 2291 at 554; thus, as Wigmore has said, "It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."

In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 (1973). *See also United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964), *cert. denied*, 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964); *Hogan v. Zletz*, 43 F.R.D. 308 (N.D.Okl. 1967), *aff'd sub nom., Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968). The privilege does not embrace everything that arises out of the existence of an attorney-client relationship. *United States v. Bartone*, 400 F.2d 459, 461 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969); *United States v. Goldfarb, supra*; *Burlington Industries v. Exxon Corp., supra*. By the same token,

> "[n]othing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam."

United States v. Kovel, supra, 296 F.2d at 921.

[5] It is vital to a claim of privilege that the communication have been made and maintained in confidence. *United States v. Hodgson, supra*; *Wirtz v. Fowler*, 372 F.2d 315, 332 (5th Cir. 1966); *United States v. Kovel, supra*, 8 Wigmore *supra*, § 2311. Thus courts have refused to apply

the privilege to information that the client intends his attorney to impart to others, *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972); *Fratto v. New Amsterdam Fire Ins. Co.*, 359 F.2d 842, 844 (3rd Cir. 1966); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963), or to communications made in the presence of third parties, *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972); *Burlington Industries v. Exxon Corp.*, *supra*, 65 F.R.D. at 37; *Cafritz v. Koslow*, 83 U.S.App.D.C. 212, 167 F.2d 749, 751 (1948).

[6, 7] Pipkins failed to establish that the handwriting samples that he gave Somerford were confidential. One's style of handwriting is not an intrinsically confidential attribute[2]; and there is nothing in the record that indicates that Pipkins subjectively intended his style of handwriting to be confidential. Defense counsel attempted to establish the requisite element of confidentiality by showing that Somerford had been directed to make no comment concerning the result of his handwriting analysis to anyone other than defense

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2. As a general rule, identifying physical characteristics such as one's style of handwriting, readily observable by anyone, are not subject to the attorney-client privilege. 8 Wigmore, Evidence (McNaughton rev. 1961) § 2306. Nor is one's style of handwriting protected by the Fifth Amendment. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *United States v McGann*, 431 F.2d 1104 (5th Cir. 1970), *cert. denied*, 401 U.S. 919, 91 S.Ct. 904, 27 L.Ed.2d 821 (1971).

counsel. This argument overlooks the fact that appellant himself had already voluntarily disclosed his handwriting style to the government before he was ever interviewed by Somerford. Any hope of confidentiality was thus an impossibility from the outset. We hold, therefore, that Pipkins failed to establish that his handwriting samples were *confidential* communications within the ambit of the attorney-client privilege.

[8] Moreover, even assuming, *arguendo*, that the samples of handwriting that Pipkins gave Somerford were privileged communications, there was no error in admitting the expert's testimony. Somerford was asked to compare the handwriting on two government exhibits; he was not questioned about either the subsequent samples or the results of the test conducted at the behest of defense counsel. Consequently, the questions propounded Somerford did not call for the revelation of the substance of a confidential communication; his testimony was confined to non-confidential matters. Somerford stated that he would be able to form his opinion without any reference to the subsequent samples. Therefore, Somerford's opinion about the handwriting on the government exhibits was not "inextricably intertwined with communications which passed between him and his client," and we do not confront testimony that necessarily "comprehended conclusions drawn in the course of an association that is uniquely regarded in the law." *United States v. Kendrick supra*, 331 F.2d at 115 (concuring opinion). Accordingly appellant's first contention is without merit.

Under the Texas statutes, the procedure directed by the trial judge was authorized since a psychiatric examination is not an adversary proceeding, but rather is to enable an expert to form an opinion as to the accused's mental capacity. Rule 706 of the Federal Rules of Evidence covers this area in federal cases and provides for appointment of expert witnesses including a psychiatrist. Pursuant to the federal rule, the expert witness shall advise the parties of his findings, his deposition may be taken, and "he may be called to testify by the court or any party. . . ." and shall be subject to cross-examination.

Habeas relief should be denied on the second issue that Petitioner's constitutional rights were violated when his psychiatric expert was called as a witness for the state because the attorney-client privilege does not embrace everything that arises out of the existence of an attorney-client relationship.

Third Issue. The introduction of hospital records under the Texas Business Records Act containing diagnostic opinions of his sanity afforded Petitioner no right of confrontation in violation of his Sixth and Fourteenth Amendment rights.

This issue was reviewed in *Granviel v. State*, *supra* at pages 120 through 122 as follows:

> Appellant complains that the trial court erred by admitting into evidence 18 pages of medical records from John Peter Smith Hospital about appellant's sanity in 1967 on the grounds that these records were a written report which was heresay and inadmissible.
>
> The trial court allowed appellant to reopen this case after closing of the guilt-inno-

cence stage. Appellant then testified about this alleged crime and examinations by psychiatrists, medical doctors and other matters including the 1967 stay in the hospital. After the conclusion of appellant's testimony, the State introduced the medical records for the purpose of rebuttal of appellant's testimony. The records were introduced under the Business Records Act, Art. 3737e, Sec. 5, V.A.C.S., which provides:

> "Any record or set of records or photographically reproduced copies of such records, which would be admissible pursuant to the provisions of Sections 1 through 4 shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Sections 1 through 4 above, that such records attached to such affidavit were in fact so kept as required by Sections 1 through 4 above, provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen (14) days prior to the day upon which trial of said cause commences, . . ."

The required affidavit was properly executed by Dorothy Copus, Custodian of the Medical Records of the hospital, attached to the medical records and was sworn and subscribed to before a Tarrant County Notary Public on September 26, 1975. This

affidavit complies with the recommended form in Art. 3737e, Sec. 7, V.A.C.S. See *Moton v. State*, Tex.Cr.App., 540 S.W.2d 715.

Appellant's objection to the admission of the medical records was "on the grounds of hearsay." The trial court overruled the objection and admitted the records. At this time the State started to read the affidavit attached to the medical records. Appellant's counsel requested that he discuss a matter of law. The jury was then retired and a proceeding was held. Appellant's counsel objected: "I take it at this time the State is trying to reopen its case and I would object to that." The State replied explaining to the trial court about the medical records and stated, "We offer them for that purpose of rebuttal of his [appellant's] testimony." The Court states: "I am of the opinion they are admissible. Objection overruled." Appellant's counsel then stated he had nothing further to offer at that time. The jury was then returned to the jury box.

The State then read the affidavit and from the medical records to the jury. Appellant's counsel again objected that Dr. Muller's notations in the medical records "are conclusions—and hearsay." The trial court overruled the objections. At this time appellant's counsel requested "the District Attorney or somebody can read the entire evidence to the jury or I assume they can take it back to the jury room and read it themselves. There is [sic] things he left out." The court replied: "The exhibit is in

evidence and should the jury desire to have the evidence, they may have it." Then the parties closed the case.

Appellant now claims that the medical records are not admissible because Art. 3737e, Sec. 5, supra, was not complied with in that it requires the medical records introduced be on file 14 days before the trial. The only date on the records is September 25, 1975 (the date of the affidavit by the custodian of the hospital medical records) which appellant's counsel used in his belated contention that 11 days only lapsed before the records were admitted in evidence herein. The record reveals the trial began on October 6, 1975.

This Court held in *Coulter v. State*, Tex. Cr.App., 494 S.W.2d 876, 883:

> "The statute permitting the admission of such records should be liberally construed but not mechanistically applied."

[20] This act is applicable to criminal cases. *Coulter*, supra.

[21–24] The objections on the record of the instant case were too general and untimely without stating the specific grounds and pointing them out to the court. An objection must be made as soon as the ground of objection becomes apparent. *Forbes v. State*, Tex.Cr.App., 513 S.W.2d 72, 80, and cases cited therein; *Williams v. State*, Tex.Cr.App., 531 S.W.2d 606. It is not error to overrule an objection that is

too general to advise the trial court of that portion of the exhibit to which the objection is directed. *Bouchillon v. State*, 540 S.W.2d 319. See also *Argonaut Southwest Insurance Company v. Morris*, 420 S.W.2d 760 (Tex.Civ.App. 1967). Admission or exclusion of hospital records is not reversible error in absence of a showing of harm to the complaining party. *Argonaut Insurance Company v. Titus*, 347 S.W.2d 372 (Tex. Civ.App. 1961).

In addition to appellant's testimony, there is evidence in the records about diagnosis of appellant's sanity by medical doctors and specialists in the medical profession. *Huff v. Insurance Company of North America*, 394 S.W.2d 849 (Tex.Civ.App. 1965) (n.r.e.), held an unsigned typewritten copy of a doctor's medical record in a workmen's compensation case was not offered in compliance with Art. 3737e, supra, and was properly excluded by the court but, in the event its exclusion was improper, any resulting error was harmless and would not require a reversal against claimant.

[25] Appellant contends in his brief that he was denied the opportunity to cross examine Dr. Muller, who did not testify, and that the medical records contain (a) a diagnosis that appellant was "found to be intelligent and no [sic] psychotic" that does not rest on a reasonable medical certainty, and (b) there is no proof that the information upon which Dr. Muller relied was "a memorandum or record of an act, event or condition" made by "an employee or representative" of the hospital "with personal

knowledge of such act, event or condition," as required by Art. 3737e, Sec. 1(a) and (b), supra. There was no objection made on these grounds at the trial and no harm has been shown; therefore the complaint comes too late.

[26] A recorded diagnosis is heresay evidence in hospital records, but is admissible if the diagnosis is one upon which competent physicians would normally agree. *Eubanks v. Winn*, 469, S.W.2d (Tex.Civ. App. 1971) (ref. n.r.e.).

It would be unusual for a medical doctor to write a legal predicate in the hospital record of his diagnosis of his patient "that my diagnosis is ___ and my decision rests on a reasonable medical certainty" (or probability).

Dr. Muller signed his own report in the medical records on March 27, 1967, and relied on his own observation and examinations of the appellant during his six day stay in the John Peter Smith Hospital and in all probability relied on the information from his mother, brother and Juvenile Probation Officers that assisted in subduing appellant and bringing him to the hospital. See and compare *Gonzales v. Gilliam*, 506 S.W.2d 650 (Tex.Civ.App. 1974).

There being an untimely and general objection and no showing of harm, ground of error eleven is overruled.

Under Texas law, the hospital records properly were admitted in evidence as an exception to the hearsay rule.

The right of confrontation and cross-examination are not absolute, otherwise no exceptions to the hearsay rule would apply in criminal cases. *Dutton v. Evans*, 400 U.S. 74 (1970). No undue infringement of confrontation is imposed when the evidence bears the indicia of reliability sufficient to insure the integrity of the fact finding process. See *United States v. Smith*, 436 F.2d 787, 789 (5th Cir. 1971), *cert. denied* 402 U.S. 976 (1971), as to Dr. Muller's qualifications.

Petitioner's objection was on the ground of hearsay. His failure to timely make the appropriate objection under the Texas contemporaneous-objection rule, absent a "cause" and "prejudice" showing, bars federal habeas corpus review of his lack of confrontation claim. *Wainwright v. Sykes, supra.*

Fourth Issue. Article 37.071(b)(2) of the Texas Code of Criminal Procedure has a chilling effect on an accused's right to raise the defense of insanity constituting a denial of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process.

The Texas Court of Criminal Appeals in *Granviel v. State, supra* at page 118 discusses this point as follows:

> Appellant asserts Art. 37.071(b)(2), supra, has a chilling effect on the defense of insanity. Appellant claims he is in the position of not using an expert witness on the issue of insanity or running the risk of having his own expert testify on cross examination to matters relating to punishment.
>
> In support of this contention appellant points to the following question asked of Dr. May during cross examination at the guilt stage of the trial:

"Q [BY PROSECUTOR]: He is, is he not, a dangerous individual, is he not?

A Definitely.

[DEFENSE ATTORNEY]: I am going to object. That is not relevant at this point. It is not relevant in this part of the trial.

THE COURT: Overruled.

[DEFENSE ATTORNEY]: Note my exception."

[13] Appellant's objection was not timely because this information was already before the jury. Prior to the testimony quoted above, the following occurred:

"Q [BY PROSECUTOR]: Doctor [Dr. May], do you not think this man is a dangerous individual?

A I certainly do."

This testimony was received without objection. Appellant waived any objection to the testimony now complained of. *Sherbert v. State*, Tex.Cr.App., 531 S.W.2d 636; *Guzman v. State*, Tex.Cr.App., 521 S.W.2d 267.

Appellant also directs our attention to the following testimony on cross examination at the guilt stage of the trial:

"Q [BY PROSECUTOR]: Dr. May, do you have an opinion based upon your

experience and your examination of Kenneth Granviel, as to whether or not there is a probability that he would commit criminal acts of violence in the future so as to constitute a continuing threat to society?

[DEFENSE ATTORNEY]: I'm going to object. That is not relevant at this stage of the hearing and besides, this is our own witness and we are heading up with 37.071(b)(2) again, which we have got motions in the record and it's immaterial at this point in the testimony.

THE COURT: Sustain the objection.

[DEFENSE ATTORNEY]: I will ask the court to instruct the jury to disregard counsel's question.

THE COURT: Ladies and gentlemen, disregard the last question.

[DEFENSE ATTORNEY]: At this point, the Court has done all within its power to eradicate the prejudicial question of the prosecutor and I would ask for a mistrial.

THE COURT: Motion is overruled."

[14, 15] Although the question was not relevant at the guilt or innocence phase of the trial, the question was not answered. The trial court's action in instructing the jury to disregard the improper question removed any prejudicial effect. *Smith*, supra; *Carey v. State*, Tex.Cr.App., 537 S.W.2d

> 757; *Ashley v. State*, Tex.Cr.App., 527 S.W.2d 302. We cannot agree that Article 37.071(b)(2) itself has a chilling effect on the defense of insanity, because nothing therein authorizes the cross examination of an expert witness for the defense on insanity as to matters relating to punishment which should be developed at the penalty stage of the trial.
>
> Ground of error eight is overruled.

Habeas corpus relief should be denied since Article 37.071(b)(2) has been found to be constitutional and thus would have no impermissible chilling effect to the right to raise the defense of insanity. *Jurek v. Texas*, 428 U.S. 262 (1976).

Fifth Issue. The death penalty in Texas is unconstitutional in the application of Article 37.071(b), Texas Code of Criminal Procedure because mental condition cannot be considered as a mitigating factor, and the Texas Court of Criminal Appeals has not given full review to convictions resulting in the death penalty.

The same jury passed on guilt and set punishment so that all evidence was before it for consideration. An abundance of evidence of the mental status of Petitioner was developed during the trial which was before the jury for possible mitigation in determining punishment.

> . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Id. at page 276.

The claim of unconstitutionality of the Texas statute has been found without merit by the Supreme Court of the United States. *Id.*

This death penalty case is important to all parties. The legal issues have been clearly presented and ably briefed.

Mr. Justice White in *Wainwright v. Sykes*, *supra* at 90 ably states:

> . . . the trial of a criminal case in state court . . . (is and should be) a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. . . .

Kenneth Granviel had a full and fair trial where he was ably represented by court appointed attorneys, who regularly practice criminal trial work and in this case carried out such representation in keeping with the highest calling of the profession. The able trial judge insured that Petitioner had every opportunity to a full airing of his defense and constitutional claims.

> . . . There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

Ibid.

RECOMMENDATION:

It is respectfully recommended that:

A. as to the Respondent Robert Cousins—this habeas corpus action be dismissed since Respondent Cousins is not a proper party; and

B. as to the Respondent W. J. Estelle, Jr., that habeas corpus relief be denied on the five issues presented for the following reasons:

> 1. first issue—involving the exclusion of five veniremen assertedly in violation of the *Witherspoon* standard should be denied as to four of the veniremen because each were properly excluded pursuant to *Witherspoon*, and as to the venireman Harrison that Petitioner failed to make a contemporaneous-objection of the exclusion thereby waiving any defect;

2. second issue—involving a claimed violation of the attorney-client relationship to include a psychiatric expert since no physician-patient privilege exists in Texas and the attorney-client privilege does not embrace everything arising out of such relationship;

3. third issue—involves the introduction of hospital records under the Texas Business Records Act thereby allegedly depriving Petitioner of the right of confrontation that Petitioner failed to timely make the appropriate objection under the contemporaneous-objection rule;

4. fourth issue—concerning the chilling effect of Article 37.071(b)(2) on the accused's right to raise an insanity defense that the statute has been held to be constitutional; and

5. fifth issue—concerning the constitutionality of the Texas death penalty—that the statute has been held to be constitutional by the Supreme Court of the United States.

Each party is granted until 12:00 noon on Friday, December 15, 1978, to serve and file written objections to this proposed Findings and Recommendations with the Court.

Should the Court perceive a possible defect that venireman Harrison may have been improperly excluded from a failure to question sufficiently to determine whether or not he was irrevocably opposed, in such event, it is recommended that a hearing with such excluded juror be conducted to finish the aborted question-

ing and determine whether he would have, in fact, been excludable for cause.

SIGNED this _____ day of November, 1978.

_____

UNITED STATES MAGISTRATE

Opposition

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NO. 81-1011

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

- against -

KENNETH GRANVIEL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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[817] 332-1335

ATTORNEY FOR RESPONDENT

QUESTION PRESENTED

Whether the Court of Appeals, the District Court and the Magistrate all erred in interpreting the voir dire transcript of a venire member, whom they all held to have been unconstitutionally excluded for cause at respondent's trial.

NO. 81-1011

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COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts are sufficiently set forth in the opinion of the Court of Appeals and Appendix thereto, as reproduced in Appendix A to the certiorari petition at A. 10-11 and A. 27.

REASON FOR DENYING THE WRIT

Review by this Court is not warranted, because the State's certiorari petition merely asks the Court to decide whether the Magistrate, the District Court and the Fifth Circuit all incorrectly interpreted a particular voir dire transcript in an individual case. See A. 10-11. No matter how hard the State strains to dress up that issue or that transcript linguistically (compare A. 27 with petition, p. 5), the issue amounts to nothing more than this. It plainly presents no question of general significance to merit review by this Court.

We further note that the Texas Court of Criminal Appeals did not take a contrary view of this venireman's responses, but rather determined that any error had been waived. Granviel v. State, 552 S.W.2d 107, 112 (Tex. Crim. App. 1976). The Fifth Circuit held that no waiver had occurred, and the State has not challenged that ruling in its certiorari petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

NO. 81-1011

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

- against -

KENNETH GRANVIEL,

Respondent.

CERTIFICATE OF SERVICE

I, FRANK W. SULLIVAN, III, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the respondent's brief in opposition and motion for permission to proceed in forma pauperis in the above case on counsel for petitioner by depositing the same in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Mark White
Attorney General of the
State of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

Attention: Leslie A. Benitez, Esq.
Assistant Attorney General

All parties required to be served have been served. Done this day of January, 1982.

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ATTORNEY FOR RESPONDENT

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

For the reasons stated in his motion for leave to file his cross-petition in forma pauperis, docketed December 9, 1981 (No. 81-5858), respondent Kenneth Granviel, by his undersigned counsel, asks leave to file his Brief in Opposition without prepayment of fees and to proceed in forma pauperis pursuant to Rule 46.

Respectfully submitted,

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